No. 75-661

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on September 4, 1975. On Sep-

tember 28, 1975, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in legislating with regard to criminal offenses committed in Indian country, Congress may, consistent with requirements of equal protection of the law, assert federal jurisdiction only with respect to offenses in which an Indian is involved either as accused or as victim, leaving to the States the prosecution of offenses entirely involving non-Indians (under laws that may differ from and in some particulars be more or less lenient than federal law).

2. Whether, if the preceding question is answered in the negative, 18 U.S.C. 1152 should be construed to assert federal jurisdiction over wholly non-Indian offenses, thereby eliminating the possibility of disparate treatment based upon the status of the accused.

STATUTES INVOLVED

18 U.S.C. 1152 provides in pertinent part:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> * * * * *

18 U.S.C. 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.
>
> As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. 1111 provides in pertinent part:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or

any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Idaho Code § 18-4001 (1948) provides:

Murder defined.—Murder is the unlawful killing of a human being with malice aforethought.

Idaho Code § 18-4003 (1974 Cum. Supp.) provides:

Degrees of murder.—All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 1, p. 588.]

Idaho Code § 18-4004 (1974 Cum. Supp.) provides:

Punishment for murder.—Every person guilty of murder in the first degree shall suffer death.

Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten (10) years and the imprisonment may extend to life. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 2, p. 588.]

STATEMENT

In February of 1974, four men broke into Emma Johnson's house, which was within the boundaries of the Coeur d'Alene Indian Reservation in Idaho (within "Indian country" as defined by 18 U.S.C. 1151), and robbed her and killed her by beating her to death (App. A, *infra*, pp. 1a-3a). Because the crimes involved Indians (here, the accused) and occurred in Indian country, they were within the jurisdiction of the federal district court. A federal grand jury returned an indictment against the respondents—Gabriel Antelope, Leonard Davison, and William Davison—and co-defendant Norbert Seyler. Count I of the indictment charged that Leonard Davison and Gabriel Antelope, enrolled Coeur d'Alene Indians, feloniously entered the house of Emma Johnson, a non-Indian, with the purpose to commit robbery. Count II charged that they forcefully took from her a purse of money belonging to her. Count III charged that they, with William Davison and Norbert Seyler, also enrolled Coeur d'Alene Indians, "with malice aforethought and in the perpetration of the robbery alleged in Count Two hereof, unlawfully and

wilfully did kill Emma Teresa Johnson * * * by beating [her] * * * with their fists and feet."

The defendants pleaded not guilty. Seyler was granted immunity and testified at trial for the government. After a jury trial in the United States District Court for the District of Idaho, respondents Antelope and Leonard Davison were convicted on all three counts, including first degree murder under Count III. William Davison was convicted solely of second degree murder under Count III (App. A, *infra*, pp. 2a-3a). After pre-sentence investigations, Antelope was sentenced to 15 years' imprisonment on each of Counts I and II and to life imprisonment on Count III, the sentences to run consecutively. Leonard Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act (18 U.S.C. 5010) for concurrent terms of 15 years on each of Counts I and II and for life on Count III. William Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act for 12 years.

The court of appeals reversed the convictions of murder. It noted that because the victim was a non-Indian, the accused, had they too been non-Indians, would not have been tried in federal court under federal law but would instead have been tried and punished under Idaho law (App. A, *infra*, p. 4a). Under Idaho law, a defendant may be convicted of first degree murder only upon proof of premeditation and deliberation concerning the murder (Idaho Code § 18-4003 (1974 Cum. Supp.)); under the applicable

federal statutes (18 U.S.C. 1153 and 1111) and the instructions to the jury in this case, however, it is possible that respondents Antelope and Leonard Davison were convicted of first degree murder on proof of killing with malice aforethought committed in the course of a robbery, even though the jury may not have found premeditation.

The court of appeals concluded that "the *sole* basis for the disparate treatment of appellants and non-Indians is that of race" (App. A, *infra*, p. 6a; emphasis in original) and held that the defendants, by being tried under federal law rather than state law, were "put at a serious racially-based disadvantage" (*id.* at 14a) that could not be justified under the government's wardship over Indians and that violated the equal protection concept implicit in the due process clause of the Fifth Amendment. The court thus held the murder provision of 18 U.S.C. 1153 unconstitutional as applied in this case. The court cautioned that it was not holding the felony murder provision of 18 U.S.C. 1111 unconstitutional (App. A, *infra*, p. 15a), but that "Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians" (*id.* at 14a).[1]

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[1] Since respondent William Davison was convicted only of second degree murder, the elements of which appear to be identical under federal and Idaho law (both 18 U.S.C. 1111 and Idaho Code §§ 18-4001, 18-4003, define second degree murder as "the unlawful killing of a human being with malice aforethought"), no reason appears in the decision of the court of appeals for reversing his conviction. Nevertheless, this ap-

REASONS FOR GRANTING THE WRIT

The essence of the holding of the court of appeals in this case is that Congress may not choose to limit the exercise of federal jurisdiction and the application of federal law to crimes committed within Indian country involving an Indian either as victim or as accused, leaving jurisdiction over wholly non-Indian cases to the States, without running seriously afoul of equal protection concepts embodied in the Fifth Amendment. The court's decision injects grave uncertainties and threatens substantial practical disruption in the enforcement of criminal sanctions, in both state and federal courts, for all offenses committed within Indian country whenever the victim is a non-Indian; it does so by requiring the trial of such offenses to be conducted under a patchwork of the most lenient ingredients of state and federal law. Moreover, this costly result has been reached on the basis of what we believe to be an erroneous premise that the instant case reflects an instance of racial discrimination. We submit that the issues presented by this case require resolution by this Court.

1. 18 U.S.C. 1152 and its statutory predecessors (R.S. 2144, 2145, 2146) appear on their face to make federal law applicable to all crimes com-

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parent oversight on the part of the court of appeals presents no question of broad importance for this Court, and our petition as to this respondent is confined to the common grounds raised as to all three respondents.

mitted by non-Indians within Indian country.[2] But this Court over a period of years has held that federal criminal jurisdiction under these statutes does not extend to crimes by non-Indians against non-Indians, even though such offenses occur within Indian country. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496; *Draper* v. *United States*, 164 U.S. 240; *United States* v. *McBratney*, 104 U.S. 621.[3] For such crimes, the State's interest in enforcement of its law as to its citizens was held to overshadow the federal interest in exercising its trust responsibility over tribal Indians and their property. See *United States* v. *McBratney*, *supra*, 104 U.S. at 624. The statutory framework now set forth in 18 U.S.C. 1152 and 18 U.S.C. 1153 as interpreted by this Court, thus applies to any of the listed crimes in which an Indian is either perpetrator or victim, but not to crimes wholly between non-Indians.

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[2] 18 U.S.C. 1153, the Major Crimes Act, provides federal jurisdiction over 13 major crimes when committed by Indians. Other crimes committed by Indians are left to tribal jurisdiction (see *Keeble* v. *United States*, 412 U.S. 205, 209-212), except for federal crimes not dependent on the territorial jurisdiction of the United States (see *Head* v. *Hunter*, 141 F. 2d 449 (C.A. 10); *Walks on Top* v. *United States*, 372 F. 2d 422 (C.A. 9), certiorari denied, 389 U.S. 879).

[3] These decisions were based primarily on the analysis of the statutes involved, including the enabling acts of the States involved in *Draper* and *McBratney*. The cases do not appear to erect any constitutional barrier to an exercise of federal jurisdiction over crimes entirely involving non-Indians, if such crimes are committed on Indian reservations or otherwise within Indian country, as defined by 18 U.S.C. 1151.

If it is accepted, as indeed this Court has held, that the line between state and federal jurisdiction over crimes occurring on an Indian reservation is properly drawn on the basis of whether an Indian is in any way involved (but see point 3, *infra*) then, in our view, it follows that Congress need not define crimes within its sphere of jurisdiction in a fashion conforming to the definition of similar crimes by the various States within their spheres of jurisdiction. The court of appeals decision to the contrary creates the anomaly that although Congress may legislate as to crimes involving Indians, whether as perpetrator or victim, its legislation is not supreme but must be conformed to, or at least must be no more "harsh" than, the equivalent state legislation. But the Constitution clearly provides for congressional authority over Indian affairs,[4] and, of course, it also provides that the law and treaties made by Congress under the Constitution "shall be the superme Law of the Land" (Art. VI, cl. 2).[5]

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[4] For an exposition of the constitutional basis of federal jurisdiction over Indian affairs, see *Morton* v. *Mancari*, 417 U.S. 535, 551-553.

[5] Conversely, by parity of reasoning, it would seem difficult, if the court of appeals is correct, to sustain the application by state courts (to non-Indians charged with crimes against other non-Indians in Indian country) of those provisions of state law that are more harsh than the federal provisions that would apply were the accused an Indian. Thus, the decision also threatens the impairment of state sovereignty in an area that, by legislation of Congress as construed by this Court, has been left to state jurisdiction.

Properly analyzed, the sole legally significant "discrimination" that must be justified to support the congressional scheme is the statutory election (actually created by decisions of this Court) to eschew jurisdiction over wholly non-Indian offenses while asserting federal jurisdiction and applying federal law to all other offenses occurring in Indian country. It is, of course, inherent in such a division of jurisdiction that the controlling substantive and procedural law will vary in numerous particulars between the two systems, since they are being ordained by different sovereigns as parts of independent regulatory structures. In light of the special, constitutionally provided responsibilities of Congress with respect to matters involving Indians, considered in conjunction with the natural interest of the States in regulating relations among their non-Indian citizens, the historic jurisdictional "discrimination" is entirely reasonable, and the inherent disparities thereby created are not subject to proper constitutional attack on equal protection grounds.

Moreover, the supposed "racial discrimination" on which the court of appeals based its decision does not exist. Properly analyzed, legislation affecting Indians and Indian country is not essentially racial. The separate treatment of Indian affairs, as this Court has noted, grows out of the former independence of the Tribes and their conquest by the United States, which then assumed a trust responsibility for them. This is not a question of race, but of political recognition. A person can cease to be an Indian in the

eyes of the law by severing his relationship with a federally recognized tribe. Similarly, persons who are racially pure-blooded Indians are not so for legal purposes if they are members of Canadian or South American tribes or of North American tribes terminated by Act of Congress. See *Morton* v. *Mancari*, *supra*, 417 U.S. at 551-555 (particularly p. 553, n. 24). Any such person accused of an offense such as that in the instant case, although racially an Indian, would have been tried by Idaho courts under Idaho law.

Equally important, in the context of this case, every defendant, whether Indian or non-Indian, tried for murder *under federal Indian country jurisdiction* is equally subject to the provisions of 18 U.S.C. 1111 (compare 18 U.S.C. 1152 with 18 U.S.C. 1153, both of which, in respect to homicide, refer to federal enclave law, *i.e.*, Section 1111, for murder). It is only when both the accused and the victim are non-Indians that a different result may obtain. But this is not because of racial discrimination for or against Indians, but on account of the recognition, in accordance with decisions of this Court, that state jurisdiction, rather than federal, governs the crime.

This Court's decision in *Keeble* v. *United States*, 412 U.S. 205, and the Ninth Circuit's prior decision in *United States* v. *Cleveland*, 503 F.2d 1067, both relied upon by the court below, are not to the contrary. In *Keeble*, the Court was concerned with whether 18 U.S.C. 1153 (the Major Crimes Act), which extends federal court jurisdiction to 13 major

crimes committed by Indians on Indian reservations, permitted federal rather than tribal jurisdiction over lesser included offenses and thus in appropriate circumstances required instructions as to lesser included offenses once the federal court had assumed jurisdiction over the major offense listed in the act. The case concerned an Indian charged with killing another Indian. In considering the question, the Court pointed to the government's concession that a non-Indian committing the same offense on the reservation would have been entitled to the instruction (412 U.S. at 208-209). But the comparison was of crimes both of which would have been under federal Indian country jurisdiction. The focus in *Keeble* thus was on the situation in which federal jurisdiction was being exercised in different fashion depending upon the status of the defendant. Nothing in *Keeble* suggests that, so long as federal jurisdiction is exercised in an even-handed manner, the Constitution forces federal law to bow to state law that would apply in cases outside federal jurisdiction.[6]

For much the same reasons, the Ninth Circuit's decision in *United States* v. *Cleveland*, 503 F.2d 1067, does not support the result reached in the instant case. In *Cleveland*, the court held that an amendment to 18 U.S.C. 1153, referring aggravated assaults by Indians to state law for definition of the crime and penalty, was unconstitutional as applied in that case because it subjected the Indian defendant

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[6] Moreover, the Court in *Keeble* engaged in statutory interpretation, not constitutional exegesis.

to more severe penalties than a non-Indian would receive under the reference of 18 U.S.C. 1152 to federal enclave law. But the court in *Cleveland* was concerned with a disparity between the treatment of an Indian defendant and a hypothetical non-Indian defendant both within federal Indian country jurisdiction. Whether or not *Cleveland* is a sound decision, it is no authority for the proposition that the federal jurisdiction exercised in 18 U.S.C. 1152 and 18 U.S.C. 1153, when internally uniform, must also be conformed to state law.

2. A. By removing certainty as to the applicable substantive and procedural law in regard to the most serious crimes whenever the victim is a non-Indian, the decision will have an adverse effect on the already difficult problems of rational and effective law enforcement within Indian country. Heretofore, all homicides, robberies, arson, larceny, and carnal knowledge of junveniles, involving an Indian as accused or victim and committed in Indian country, have been defined and punished under clearly understood federal statutes—*i.e.*, general federal enclave laws that apply to all persons, regardless of race or status, within areas of exclusive federal jurisdiction.[7] This provides certainty in the law applicable to the major offenses.

[7] Several other crimes, either under the Assimilative Crimes Act, 18 U.S.C. 13, or under the second and third paragraphs of 18 U.S.C. 1153, are referred to state law for either definition or punishment.

The court of appeals has now required district judges in homicide cases in Indian country—and presumably in the other major offenses governed by federal substantive law—not to apply the federal statutes as written, but to compare them to the state law in effect at the time and apply a composite rule assuring the Indian defendant the most lenient aspect of each. This exercise, while perhaps superficially attractive, can only lead to uncertainty in an area demanding certainty. Here, for instance, Idaho has recently amended its first degree murder statute to remove the felony murder doctrine but to provide a mandatory death sentence. According to the court of appeals, the district court, rather than applying 18 U.S.C. 1111 as directed by 18 U.S.C. 1153, should have afforded the Indian defendant the benefit of that aspect of the Idaho statute that precludes a felony murder instruction. But must the district court reject other portions of the Idaho statute, specifically the mandatory death sentence? We assume so. But this means that the district court is required to apply a patchwork of legal principles reflecting no coherent system, neither the laws enacted by Congress nor the framework selected by the state legislature.

Furthermore, it seems doubtful that there is any way to confine the impact of the court of appeals' decision within manageable bounds. Its logic, if sound, applies not only to the substantive definition of the offense and the potential punishment upon conviction, but also to the myriad of procedural matters

of potentially critical importance to the outcome of a trial. Differences in liberality of discovery, burden of proof on affirmative defenses, formulation of jury instructions, and similar matters between federal and state systems would give rise to "racial discriminations" equally deserving of the criticism leveled here against the application of federal felony murder principles. For example, if a State imposed upon the defendant the burden of establishing an insanity defense (*e.g.*, *Leland* v. *Oregon*, 343 U.S. 790) but utilized a far more liberal version of the defense than is recognized in federal law, Indians seeking to raise such a defense would presumably have to be afforded the liberal state definition of insanity, while the burden of proof would remain on the prosecution under applicable federal principles (and, presumably, state courts trying non-Indians for crimes in Indian country would have to permit them the boon of the federal burden of proof requirements). Such a result appears manifestly unsatisfactory.

The opportunities for confusion and dispute created by the court of appeals' decision thus appear virtually limitless. Moreover, it will often be impossible for a judge to determine whether the state or the federal statute is more "lenient". For instance, the federal manslaughter statute, 18 U.S.C. 1112, provides only two categories of manslaughter, voluntary and involuntary, and provides imprisonment of not more than ten years for the former and not more than three years and a fine of $1000 for the latter. The Idaho statutes (§§ 18-4006, 18-4007 (1974 Cum.

Supp.)) provide four categories of manslaughter and penalties varying by category, some greater, some less than under the federal statute. An attempt to collate these statutes leads to nothing but confusion.

Last but by no means least, the concept of leniency, if it creates uncertainty of this kind, cannot be equated with "the interest of the Indians." Reservation Indians, like persons in an underprivileged neighborhood of a city, have an interest in effective law enforcement as well as leniency. The complicated comparison in search of leniency required by the opinion below, in our view, is not in the Indian interest.

B. The decision below substantially affects law enforcement in some of the major areas of Indian country in the Nation. The Ninth Circuit includes Arizona, where the major portion of the Navajo Reservation and the entirety of the Hopi Reservation are located, as well as the Fort Apache, San Carlos and Papago Reservations. It also includes the substantial reservations located in the States of Washington and Montana as well as the several smaller reservations of Nevada and Oregon.[8]

The problems created by the decision below are, accordingly, not limited to Idaho. For example, under

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[8] California is unaffected because Public Law 280 makes state criminal law applicable within all the reservations of that State. Act of August 15, 1953, 67 Stat. 588 *et seq.*, 18 U.S.C. 1162; Act of April 11, 1968, 82 Stat. 78 *et seq.*, 25 U.S.C. 1321 *et seq.* The Act also applies to some reservations in Oregon, Washington and Montana.

the Arizona homicide statutes, Ariz. Rev. Stat. §§ 13-451 to 13-463 (1956), the basic definitions of murder in the first and second degrees and manslaughter are similar to those of the federal statutes. Compare, Ariz. Rev. Stat. §§ 13-451, 13-455, 13-456 with 18 U.S.C. 1111 and 18 U.S.C. 1112. The punishments for murder in the second degree and involuntary manslaughter, however, can be more severe under Arizona law than under federal law. Compare Ariz. Rev. Stat. § 13-453(B) with 18 U.S.C. 1111(b); Ariz. Rev. Stat. § 13-457 with 18 U.S.C. 1112(b). Since the state statutes are more severe it might be supposed that the *Antelope* problem could be avoided, at least in its direct application to *federal* prosecutions. But the Arizona statutes also contain detailed provisions on justifiable homicide not found in any federal statute. Ariz. Rev. Stat. § 13-462. In this respect the state statutes are perhaps more forgiving of homicide. In a homicide trial in federal court under Indian country jurisdiction, must the judge incorporate these provisions even if some of them are contrary to federal law? In a homicide trial in state court, where the homicide occurred on an Indian reservation, can the full penalties of Arizona law be imposed? This kind of uncertainty, inherent in the comparison of legal systems, could not have been intended by this Court in holding crimes between non-Indians committed on Indian reservations to be governed under state law.

3. On its face, the first paragraph of 18 U.S.C. 1152 appears to constitute an assertion of federal jurisdiction over all offenses committed in Indian country, regardless of the identity of the accused (the second paragraph carves out certain offenses committed by Indians, but creates no exception for non-Indian defendants). As indicated earlier (pp. 8-9, *supra*), this Court has, in cases such as *McBratney* and *Draper*, construed Section 1152's predecessors as not encompassing wholly non-Indian transactions, even though occurring within a geographical area over which Congress could exercise exclusive jurisdiction. The effect of the holding of the court of appeals has been to render Section 1152 unconstitutional in many of its likely applications. There would, however, be no constitutional problem of the sort perceived by the court of appeals if the statute were read literally to encompass all offenses occurring in Indian country, even those in which no Indian is involved.

Accordingly, if this Court agrees with the court of appeals that the statute as traditionally construed and applied creates serious constitutional problems, we believe it becomes necessary for this Court further to consider the question whether, in order to preserve the constitutionality of the legislative scheme, the applicable statutes should not be construed to reflect an assertion of federal jurisdiction over all offenses, regardless of the identity of accused and victim, committed in Indian country.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-2741

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

GABRIEL FRANCIS ANTELOPE, DEFENDANT-APPELLANT.

No. 74-2742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

LEONARD FRANCIS DAVISON and
WILLIAM ANDREW DAVISON,
DEFENDANTS-APPELLANTS.

OPINION

[September 4, 1975]

Appeal from the United States District Court
District of Idaho

Before: KILKENNY, CHOY and GOODWIN,
Circuit Judges.

KILKENNY, Circuit Judge:

Appellants, all enrolled members of the Coeur d'Alene Indian tribe, appeal their convictions, after a jury trial, of murder in violation of the Major Crimes Act, 18 U.S.C. § 1153, as defined in 18 U.S.C. § 1111.

FACTS AND PROCEEDINGS BELOW

Count I of the indictment charges appellants Antelope and Leonard Davison with the felonious entry of the home of a non-Indian woman, situated within the confines of the Coeur d'Alene Indian Reservation [Indian country] in Idaho, with the intent to commit robbery in violation of 18 U.S.C. § 1153. Count II of the indictment charges the same appellants with robbery of a purse containing money from the woman within the confines of the same reservation, all in violation of 18 U.S.C. §§ 1153 and 2111. Count III of the indictment charges appellants Antelope, Leonard Davison and William Davison, along with non-appellant Seyler, with killing the woman in the perpetration of the robbery alleged in Count II, unlawfully and wilfully and with malice aforethought by beating her, a non-Indian, with their fists and feet, within the exterior boundaries of the aforementioned Indian Reservation, all in violation of 18 U.S.C. §§ 1153 and 1111.

Appellants entered pleas of not guilty. Seyler was granted immunity and testified at trial as a government witness. The jury found Antelope and Leonard Davison guilty on all three counts, including first degree murder on Count III. William Davison was convicted solely of the lesser included offense of second degree murder on Count III.

ISSUE

Appellants' common contention is that the murder provision of 18 U.S.C. § 1153 is unconstitutional as applied to them. They argue that it operated to deprive them of equal protection and due process under the Fifth Amendment through an invidious racially-based discrimination unjustified by a proper governmental objective.

THE STATUTORY FRAMEWORK

Murders committed within "Indian country" fit into and are prosecuted under one of four categories:

(1) The crime of killing an Indian by an Indian is governed by the Major Crimes Act, 18 U.S.C. § 1153.[1] Murder under that section is defined in 18 U.S.C. § 1111,[2] which includes a version of the traditional felony murder definition.

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[1] Section 1153 provides in pertinent part:

"Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . , shall be subject to the same laws and pentlties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

[2] Section 1111 provides in pertinent part:

". . . Murder is the unlawful killing of a human being with malice aforethought. *Every murder . . . committed*

(2) The crime of killing of an Indian by a non-Indian is governed by the Federal Enclave Law, 18 U.S.C. § 1152,[3] which also refers to § 1111 for the definition of murder.

(3) The crime of killing a non-Indian by an Indian is also controlled by § 1153, as defined in § 1111. This is, of course, the situation in the case before us.

(4) In obvious contrast to the above, the killing of a non-Indian by a non-Indian in Indian country is a matter for prosecution by the state in which the offense occurred. *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *United States* v. *McBratney*, 104 U.S. (14 Otto) 621 (1881); *United States* v. *Cleveland*, 503 F.2d 1067 (CA9 1974). Accordingly, the definition of murder in such a case is determined by reference to the situs state's law.

In 1966 Congress amended § 1153 to define and punish in accordance with *state* law assault with a dangerous weapon, incest, and assault with intent to commit rape. *See* 1966 U.S. Code Cong. & Adm. News 3653. Burglary was already so treated. The other amendment in 1968 made definable and punish-

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in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or *robbery* . . . is murder in the first degree." [Emphasis supplied.]

[3] Section 1152 provides in pertinent part:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

able under state law is the offense of assault resulting in serious bodily injury. However, neither amendment changed the definition of murder, which was and remains subject to federal definition under § 1111.

If, in this case, appellants had been non-Indians they would have been indictable only in the Idaho state courts under the murder definition contained in I.C.A. § 18-4003.[4] This provisions, unlike the federal version in § 1111, contains no felony murder provision, but instead would require for conviction proof of premeditation and deliberation.

THE EQUAL PROTECTION CLAIM

The cornerstone of appellants' challenge is that they are discriminated against by reason of the racially-based disparity of governmental burdens of proof under 18 U.S.C. §§ 1153, 1111, and I.C.A. § 18-4003. Needless to say, it requires less evidence to

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[4] I.C.A. § 18-4003 provides as follows:

". . . All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree."

obtain a first degree murder conviction under the federal definition in § 1111, with the felony murder inclusion, than is needed to obtain a murder conviction under the Idaho statute lacking such a provision. Not requiring proof of the critical *mens rea* element of premeditation and deliberation, the federal prosecution of appellants is far less burdensome than had they been non-Indians subject only to Idaho jurisdiction.

Appellants correctly note that Congress has granted federal courts jurisdiction over the crime of which they are convicted solely on the basis of their race. Their argument, however, is not against the grant of jurisdiction itself, but rather against the accompanying definition of murder. They claim that, at least in their case, the definitional difference under the jurisdictional veil allows the government to accomplish something it would be prohibited from doing through direct statutory means if it were to prosecute both Indians and non-Indians for murders of non-Indians in Indian country.

We here emphasize that the *sole* basis for the disparate treatment of appellants and non-Indians is that of race. Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974); *Johnson* v. *Robison*, 415 U.S. 361, 364 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677, 680 n. 5 (1973); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, if a classification would be invalid under the

Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971), and *Johnson* v. *Robison*, *supra*, 364 n. 4. Racial classifications are inherently suspect, are subject to the "most rigid scrutiny," and bear a far heavier burden of justification than other classifications. *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969); *McLaughlin* v. *Florida*, 379 U.S. 184, 194 (1964); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). They can pass constitutional muster only if they are not invidious or capricious and are reasonably related to a proper governmental objective. *Bolling* v. *Sharpe*, *supra*, at 499, 500.

We have had occasion to review the constitutionality of § 1153 under equal protection and due process challenges in a variety of circumstances, but none involving murder or otherwise in point on appellants' claim. In *Gray* v. *United States*, 394 F.2d 96 (CA9 1967), *cert. denied* 393 U.S. 985 (1968), we employed the traditional doctrine of federal wardship or protection of Indians in upholding as constitutional a disparity in sentencing in rape cases. However, the difference in treatment in *Gray* operated to mitigate the penalty for Indians raping non-Indians and thus inured to the Indians' benefit. This contrasts with the present case in which appellants are put at a distinct *disadvantage* by the statute.

Appellee places great reliance upon *Henry* v. *United States*, 432 F.2d 114 (CA9 1970), *cert. denied* 400

U.S. 1011 (1971), in which we held that although the defendant Indian was erroneously charged under § 1152 for his rape of two non-Indians on an Indian reservation, rather than correctly under § 1153, he was not prejudiced thereby and the error was harmless. More importantly, we rejected in *Henry* an equal protection claim which at least superficially resembles appellants', namely:

> "[i]f, as hypothesized by appellant, one of the four defendants had happened to be a non-Indian, both the victim and the offender would be non-Indians, and the crime of rape would not have been determined by reference to §§ 1152 and 2031 [federal definition of rape] . . . , but by the law of Nevada . . ."

Id. at 118. We dismissed this claim specifically because the law operated to apply identical definitions of rape under either federal or Nevada law, thus creating no real disparity of treatment between Indians and non-Indians charged with rape of non-Indian victims. *Henry* followed the holding of *Mull* v. *United States*, 402 F.2d 571 (CA9 1968), *cert. denied* 393 U.S. 1107 (1969). We there held that when a statute does not subject the Indian defendant to any truly invidious racial discrimination (*i.e.*, when he is not put in a genuinely disadvantageous position), it cannot be challenged on equal protection grounds.[5] Of course, appellants' situation is precisely

[5] *Mull* involved an assault by an Indian agent against an Indian. After stating the above rule, we added:

[Footnote continued on page 9a]

the opposite and serves as a critical point of distinction for our purposes. *Mull*, *Gray* and *Henry* all sustained § 1153 under constitutional challenges, but none of them involved the kind of invidious discrimination which puts an Indian defendant at a serious procedural or substantive disadvantage. Appellants' case is clearly one of first impression.

We believe that the rationale expressed in our recent decision in *United States* v. *Cleveland*, 503 F.2d 1067 (CA9 1974), is here applicable. That case involved two categories of *assaults* in Indian country; Indians against Indians and Indians against non-Indians. Regarding the latter, we said a claim of unconstitutional discrmination due to an alleged discrepancy in burdens of proof for assault must fail because state law (Arizona) would apply equally whether the defendant be Indian or non-Indian.[6] Citing *Henry* v. *United States*, supra, we noted that "[i]n a case involving offenses committed by Indians against non-Indians, similar constitutional arguments

[5] [Continued]

> "We deal here only with this appellant and the offense of which and the statutes under which he was convicted. We express no opinion as to other offenses, or as to the effect of later amendments to the statutes as they relate to an offense committed after their enactment." 402 F.2d at 573.

[6] The final paragraph of 18 U.S.C. § 1153 reads:

> "As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed."

were rejected by this Circuit for similar reasons," *i.e.*, the creation of equal treatment by the 1966 and 1968 amendments to § 1153. 503 F.2d at 1071 n. 4.

However, we there took a different position when faced with an assault by an Indian against an Indian in the Arizona legal context. The employment in Arizona of § 1153 for Indian assault defendants and § 1152 for non-Indian assault defendants was such that "[t]he statutory scheme . . . [made] Indians subject to more severe punishment than . . . non-Indians . . . and *reduce*[*d*] *the prosecutor's burden of proof.*"[7] *Id.* at 1071 n. 5. We concluded there was not a sufficient federal or state interest justifying the distinction, one based solely on race. Accordingly, we held that, in the Arizona context, the assault provision violated the Indian defendants' Fifth Amendment due process and equal protection rights.

We there followed, without citation, the logic of *United States* v. *Boone*, 347 F. Supp. 1031 (D. N.M. 1972), heavily relied upon by appellants. *Boone* held unconstitutional that portion of § 1153 referring to state law the definition and punishment of assault with a dangerous weapon by an Indian. Employing reasoning identical to ours in *Cleveland*, the *Boone* court held that the provision placed the Indian at an unjustified, discriminatory disadvantage since under

[7] Comparing 18 U.S.C. § 113 (c), (d) (non-Indian defendants) with A.R.S. §§ 13-249, 13-245(A)(5), (C) (Indian defendants) on the severity of punishment, and 18 U.S.C. § 113 (c) with A.R.S. § 13-249 (A) on the prosecutorial burden of proof.

New Mexico law the prosecution need not prove intent to do bodily harm, which is a requirement under § 1152 when the defendant is a non-Indian.

Both *Cleveland* and *Boone* involved offenses against Indians, so federal jurisdiction existed regardless of the race of the defendant. Here, of course, the question is complicated by the absence of federal jurisdiction against our comparative group, non-Indians killing non-Indians.[8] Appellee argues that appellants are, in reality, complaining of discriminatory jurisdiction, a matter beyond review. We disagree. In *United States* v. *Cleveland*, *supra*, at 1071, we said:

> "The effect of the 1966 and 1968 amendments to section 1153, subjecting Indians who assault non-Indians to state law was to create *equal treatment* of non-Indians and Indian defendants for this category of offenses, [footnote omitted] *excepting only that the Indians are prosecuted in federal courts and non-Indian defendants are prosecuted in the state courts.*" [Emphasis supplied.]

Murder, at least in the Idaho context, does not incur the equal treatment the Congressional amendments gave to assault, though the separate jurisdictional element is obviously still present.

In effect, the murder provision of § 1153 brings about the same unconstitutional disparity of burdens

[8] We noted in *Cleveland*, *supra*, at 1071.

> "The Indians do not contend that the difference in jurisdiction denies them either due process or equal protection."

of proof condemned in *Cleveland*, except that it does not provide any justification for the discriminatory treatment. The government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage when both Indian and non-Indian defendants are jurisdictionally covered. To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity, employing jurisdiction as an inviolate tool. Congress developed the jurisdictional scheme for crimes committed in Indian country, and in so doing it is clearly subject to the strictures of the Fifth Amendment.

Appellee argues that the established federal wardship of Indians justifies the government's treatment of appellants, thus providing the requisite "proper governmental objective." *Bolling* v. *Sharpe*, *supra*, at 500. True enough, Congress has established for Indians a special protected status under the guardianship of the federal government. *Board of Commissioners of Creek County, Okla.* v. *Seber*, 318 U.S. 705 (1943); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Gray* v. *United States*, *supra*, at 98. Moreover, the grant of national and state citizenship to Indians did not lessen the protection of this guardianship. *In re Carmen's Petition*, 165 F. Supp. 942 (N.D. Cal. 1958), *aff'd sub nom. Dickson* v. *Carmen*, 270 F.2d 809 (CA9 1959), *cert. denied* 361 U.S. 934 (1960). Beyond doubt, as was held in *United States*

v. *Thomas*, 151 U.S. 577, 585 (1894), the federal government has

> ". . . full authority to pass such laws . . . as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations."

Nevertheless, the wardship doctrine remains subject to constitutional limitations in recognition of Indians' inherent rights as citizens. *United States* v. *Klamath & Moadoc Tribes of Indians*, 304 U.S. 119, 123 (1938). The Supreme Court recently spoke of this problem in *Keeble* v. *United States*, 412 U.S. 205, 211-212 (1973), referring to the original purpose of the Major Crimes Act *vis-a-vis* Indian defendants' modern-day constitutional rights:

> "In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others.' 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). *This is emphatically not to say, however, that Congress intended to deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant.*" [Emphasis supplied.][9]

[9] The issue in *Keeble* was whether an Indian prosecuted under § 1153 is entitled to a jury instruction on lesser included offenses. The Court held that an Indian has such a

Thus, it is clear that when Indians are put at a serious racially-based disadvantage, especially—as here—in matters of the criminal rights of defendants, such discriminatory treatment cannot be justified by the wardship concept. The Indians' protected status cannot be employed to make their prosecution for murder easier than that of non-Indians under identical circumstances. Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians.

The argument is also made that the need for uniform federal law within the confines of Indian reservations—some of which traverse state lines—provides the requisite "proper governmental objective" to sustain the statute's constitutionality. We reject this argument. First of all, Congress has already seen fit to make the definition and punishment of certain other crimes under § 1153 wholly dependent upon state law, thus showing a legislative intent to risk possible inconsistency within multi-state reservations in order to secure equal treatment in the prosecution of Indians and non-Indians. Murder was intentionally omitted from this egalitarian scheme. More important, we view a possible legal fortuity based on location to be much less onerous than one based on the inherently suspect classification of race. Consistency in federal criminal law is ordinarily a highly

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constitutionally guaranteed right if the facts of his case so warrant, even though the lesser included offense is not expressly enumerated in the statute.

laudable legislative objective, but not when it operates to deprive citizens of their right to equal treatment. Just as in this wardship argument, *supra*, it is elementary that in the case of such a conflict the Fifth Amendment takes priority.

It is our considered judgment that § 1153's murder provision is unconstitutional as applied in this case. This is due to the nature of Idaho's murder statute which does not contain a felony murder provision. The constitutionality of § 1153, as applied to murders in other states is not before us. Nor do we reach the contention that the felony murder provision of § 1111 is unconstitutional on its face. If the federal-state disparity elsewhere does not result in discriminatory treatment to the Indian defendant (*i.e.*, if they are treated no worse than similarly situated non-Indians), a *Henry*-type situation would exist and they cannot complain.

CONCLUSION

Because appellants were indicted and convicted under a statute unconstitutional in its application to them, their convictions of murder under Count III are reversed. In so disposing of this appeal, we need not consider appellant William Davison's other assignments of error. Since appellants Antelope and Leonard Davison do not challenge their convictions of burglary and robbery under Counts I and II of the indictment, those convictions are affirmed.

Affirmed in part and reversed in part.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-2741

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

GABRIEL FRANCIS ANTELOPE, DEFENDANT-APPELLANT.

No. 74-2742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

LEONARD FRANCIS DAVISON and
WILLIAM ANDREW DAVISON,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Idaho

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Idaho and was duly submitted.

On consideration whereof, it is now ordered and adjudged by this court, that the judgment of the said district court in this cause be, and hereby is affirmed in part and reversed in part.

Filed and entered September 4, 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 595883 90

Supreme Court, U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-661

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 3, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-661

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX*

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* A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was filed as Appendix A to the petition for a writ of certiorari (pp. 1a-15a). The judgment of the court of appeals was reproduced as Appendix B to the petition (p. 16a).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Criminal No. 2-74-15

UNITED STATES

v.

LEONARD FRANCIS DAVISON
WILLIAM ANDREW DAVISON
GABRIEL FRANCIS ANTELOPE
and
NORBERT HILLARY SEYLER

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1974	
April 16	Filed Indictment
	* * * *
April 29	Record of arraignment; Deft. L. Davison pleaded not guilty to Counts 1, 2, and 3; Deft. W. Davison pleaded not guilty to Count 3; Deft. Antelope pleaded not guilty to Counts 1, 2, and 3; Deft. Seyler pleaded not guilty to count 3 * * *.
	* * * *
May 28	Filed order of dismissal of Deft. Seyler (JBA) Book 4 p. 138.
	* * * *
May 31	Filed jury verdict—guilty all 3 counts—deft. Antelope. Filed jury verdict—guilty all 3 counts—deft. L. Davison. Filed jury verdict—guilty to Count 3 to lesser included offense of 2nd degree murder—deft. W. Davison.
	* * * *

DATE	PROCEEDINGS
1974	
June 14	Record of sentencing: Deft. Wm. Davison sentenced to 12 years under FYCA under 18 U.S.C. 1111 and 5010(c) * * *.
	* * * *
	Record of sentencing: Deft. Leonard Davision sentenced to 15 years Count 1, 15 years Count 2 and life Count 3 under FYCA. All terms to run consecutively * * *.
	* * * *
	Filed order modifying sentence as to Deft. L. Davison; Sentences to run concurrently (JBA) Book 4 p. 144.
	* * * *
	Record of Sentencing; Deft. Antelope sentenced to 15 years Count 1; 15 years Count 2, and life Count 3 all to run consecutively * * *.
	* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 74-2741
74-2742

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GABRIEL FRANCIS ANTELOPE,
LEONARD FRANCIS DAVISON,
and
WILLIAM ANDREW DAVISON,
DEFENDANTS-APPELLANTS

DATE	PROCEEDINGS
1974	
September 16	Docketed cause and entered appearances of counsel.
	* * * *
1975	
July 8	Argued and Submitted to: Kilkenny, Choy, Goodwin, CJJ
September 4	Filed Opinion—Affirmed in part and reversed in Part. Filed and Entered Judgment.
October 16	Issued Judgment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CR 2 74 15

UNITED STATES OF AMERICA

—*vs.*—

LEONARD FRANCIS DAVISON,
WILLIAM ANDREW DAVISON,
GABRIEL FRANCIS ANTELOPE,
and
NORBERT HILLARY SEYLER,
DEFENDANTS

INDICTMENT

(Violation 18 USC 1153 & Idaho Code Sections 18-1401 & 18-1402; 18 USC 2111; and 18 USC 1111)

The Grand Jury charges:

COUNT ONE
(Vio. 18 USC 1153 and Idaho Code Sections 18-1401 & 18-1402)

That on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country, the defendants, LEONARD FRANCIS DAVISON and GABRIEL FRANCIS ANTELOPE, enrolled Coeur d'Alene Indians, did purposely, knowingly, unlawfully, and feloniously enter in the nighttime into a certain building, to-wit, a house located in Block 29 of the City of Worley, Idaho, the residence and property of Emma Teresa Johnson, a non-Indian, with the purpose then, there and therein to commit a felony, that is, robbery.

COUNT TWO
(Vio. 18 USC 1153 and 2111)

That on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country, the defendants, LEONARD FRANCIS DAVISON and GABRIEL FRANCIS ANTELOPE, enrolled Coeur d'Alene Indians, by force and violence and against resistance and by putting in fear, unlawfully and wilfully did take from the person and presence of Emma Teresa Johnson, a non-Indian, a thing of value, that is, a purse and an undetermined amount of money, all being the property of the said Emma Teresa Johnson.

COUNT THREE
(Vio. 18 USC 1153 and 1111)

That on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country, the defendants, LEONARD FRANCIS DAVISON, WILLIAM ANDREW DAVISON, GABRIEL FRANCIS ANTELOPE and NORBERT HILLARY SEYLER, enrolled Coeur d'Alene Indians, with malice aforethought and in the perpetration of the robbery alleged in Count Two hereof, unlawfully and wilfully did kill Emma Teresa Johnson, a non-Indian, by beating the said Emma Teresa Johnson with their fists and feet.

A TRUE BILL

DONALD A. GETTLE, Foreman

MIKEL H. WILLIAMS

Assistant United States Attorney

[296] [DIRECT EXAMINATION OF NORBERT H. SEYLER]

* * * *

Q. All right. Thank you. What did you do after getting out of the car?

A. We went to the house [of Emma Johnson].

Q. Who was "we"?

A. Me, Gabe [respondent Antelope] and Bumbee [respondent William Davidson].

Q Now, how did you say you went to the house? Who was the first one to enter the house?

A. Gabe.

Q. Who was the next one to enter the house?

A. Bumbee.

Q. Who was the last one to enter the house?

A. Me.

Q. Now, what did you see when you first entered the house?

A. (No response.)

Q. What was the first thing that you saw?

A. I saw Gabe standing over Mrs. Johnson.

Q. What?

A. I saw Gabe standing over Mrs. Johnson kicking her.

Q. Did you see J. R. [respondent Leonard Davison] at that time?

A. Yes.

Q. Where was he?

A. He was in the bedroom digging into some drawers.

[297] Q. Do you recall how many times Gabe Antelope kicked Mrs. Johnson?

A. No.

Q. Can you make an estimate?

MR. BOWLES: I object. He has testified that he does not recall.

THE COURT: You may answer the question, Mr. Seyler, if you can make any kind of a reasonable estimate. If you feel that you cannot, why, of course you should not answer.

THE WITNESS: Eight times.

THE COURT: Pardon me?

THE WITNESS: Around eight times.

THE COURT: Of course, you understand that's just an estimate; is that correct? Is that just an estimate?

THE WITNESS: Yes.

Q. BY MR. WILLIAMS: Now, when you went to the house, first went up there, did you notice if the door was open or closed?

A. It was open.

Q. Were there any lights on in the house when you went in?

A. Yes.

Q. What light was this, or could you tell?

A. The bedroom light and the living room light.

[298] Q. And you say when you went in Mrs. Johnson was lying on the floor?

A. Yes.

Q. Now, were you able to tell if that was the same Mrs. Johnson that you had seen on previous occasions?

A. Yes.

Q. Was it?

A. Yes.

Q. Now, you stated that Gabriel Antelope was kicking her. Now, where were his blows landing, if you were able to tell?

A. The head.

Q. How was he kicking her? Can you describe it?

A. He was just standing above her stomping on her.

Q. What type of shoes did he have on?

A. Black boots.

Q. Excuse me. I didn't hear that.

A. Black boots.

Q. Approximately how far off the floor was Mr. Antelope lifting his foot as he was going through what you have described as the stomping action?

A. I wasn't watching his foot lots of times.

Q. Did this appear to have any effect on [299] Mrs. Johnson that you could see, visual effect?

A. Yes.

Q. What was this?

A. She was bleeding pretty bad.

Q. Did you say anything to Gabriel Antelope at this time?
A. Yes.
Q. What did you say?
A. I said "Don't. She's already dead."
Q. What was his response?
A. He says "I want to make damn sure."
MR. BOWLES: I didn't hear the response.
THE WITNESS: "I want to make damn sure."
Q. BY MR. WILLIAMS: Now, did anyone approach Gabriel Antelope while he was doing this?
A. Yes.
Q. Who was this?
A. J. R.
Q. What did he do?
A. He was trying to hand Gabriel a razor knife.
Q. Did he say anything?
A. Yes.
Q. What did he say?
A. He said "Cut her throat."
Q. What response, if any, did Gabriel Antelope [300] say?
A. He said "No, I'll kick her to death."
Q. What, if anything, happened after Gabriel Antelope had kicked Mrs. Johnson? Did anyone else approach her?
A. Yes.
Q. Who was this?
A. Bumbee.
Q. What did he do?
A. He kicked her in the head twice.
Q. What was J. R. and Gabe doing at this time?
A. They was in the bedroom looking around for some stuff to take.
MR. WILLIAMS: I request that the witness be allowed to approach what has been marked as Plaintiff's, I believe—
THE COURT: You may step down, Mr. Seyler.
Q. BY MR. WILLIAMS: Do you still have your green pen, Mr. Seyler?
A. Yes.

Q. Would you place an "S" where you were standing in the house.
MR. REED: At what point in time?
Q. BY MR. WILLIAMS: When you first entered the house.
[301] A. (Witness complied.)
Q. Now, could you place a double X where you say you first saw Gabriel Antelope.
A. (Witness complied.)
Q. Could you draw a straight green line to represent how Mrs. Johnson was lying on the floor.
A. (Witness complied.)
Q. Where was William Davison when you saw him when you first went in the house?
A. (Witness indicated.)
Q. How did you mark that?
A. With a "D."
Q. Would you place an "L. D." where you saw Leonard Davison.
A. (Witness complied.)
Q. Now, did you go into the house any further than that at any later time, than where you have marked on the diagram?
A. Yes, sir.
Q. Where did you go?
A. About right here (indicating).
Q. Would you place a double S there, please. Put two SS's, please.
A. (Witness complied.)
Q. You may return to the witness stand.

* * * *

[478] [Excerpts from the Court's Instructions]

* * * *

INSTRUCTION NO. 29

It is charged in Count III of the indictment that on or about February 18, 1974, at Worley, State and District of Idaho, within the exterior boundaries of the Coeur d'Alene Indian Reservation and within Indian country the defendants Leonard Francis Davison, Wil-

liam Andrew Davison, and Gabriel Francis Antelope, enrolled Coeur d'Alene Indians, with malice aforethought and in the perpetration of the robbery alleged in Count II hereof, unlawfully and wilfully did kill Emma Theresa Johnson, a non-Indian, by beating the said Emma Theresa Johnson with their fists and feet.

[479] INSTRUCTION NO. 30

Section 2111 of Title 18, United States Code, provides in pertinent part as follows: "Murder is the unlawful killing of a human being with malice aforethought. Every murder committed in the perpetration of any robbery is murder in the first degree."

INSTRUCTION NO. 31

Five essential elements must be proved in order to establish the crime of murder in the first degree as charged in Count III of the indictment: First, that the crime, if you find that a crime was committed, occurred within the Indian country and within the exterior boundaries of the Coeur d'Alene Indian Reservation;

Second, that the defendants Leonard Francis Davison, William Andrew Davison, and Gabriel Francis Antelope are Indians;

Third, that the defendants killed Emma Theresa Johnson unlawfully;

Fourth, that the act was done with malice aforethought;

And fifth, that the act was done in the perpetration of a robbery.

Again, the burden is always on the [480] prosecution to prove every essential element of the crime charged beyond a reasonable doubt.

INSTRUCTION NO. 32

Malice may be either expressed or implied. Malice is implied when the killing is a direct causal result of the perpetration of a felony inherently dangerous to human

life. The mental state constituting malice aforethought does not necessarily require any ill will or hatred toward the person killed.

Aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede, rather than follow, the act.

INSTRUCTION NO. 33

Perpetration means the performance or commission of a crime, thus you may not find the defendants guilty of the crime of murder in the first degree by reason of a killing during the perpetration of a robbery unless you find beyond a reasonable doubt that at the time of the killing the defendants were engaged in the performance or commission of a robbery, either as principals or as aiders, abetters, as those terms are defined later in these instructions.

[481] INSTRUCTION NO. 34

The unlawful killing of a human being, whether intentional, unintentional, or accidental which occurs as a result of the commission of the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit the crime of robbery is murder of the first degree, even though the killing was not planned as a part of the robbery. The specific intent to commit robbery and the commission of such a crime must be proved beyond a reasonable doubt.

INSTRUCTION NO. 35

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such course is consistent with the facts found by the jury from the evidence in the case and with the law as given in the instructions of the Court.

So if the jury should unanimously find the defendant not guilty of the crime of murder in the first degree, then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.

The crime of murder in the first degree by [482] reason of a killing committed in the perpetration of a felony necessarily includes the lesser offense of second degree murder.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Cr. 2-74-15

UNITED STATES OF AMERICA

vs.

WILLIAM ANDREW DAVISON, DEFENDANT

JUDGMENT AND COMMITMENT

On this 14th day of June, 1974 came the attorney for the government and the defendant appeared in person and with his counsels Scott Reed and John Walker Esqs.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty to the lesser included offense of second degree murder of the offense of first degree murder in violation of 18 USC 1153 and 1111 as charged in Count 3 of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

The Court finds the defendant was 14 years of age at the date of conviction and is suitable for handling under the Federal Youth Corrections Act (18 USCA 5005-5024).

IT IS ORDERED AND ADJUDGED that the defendant is hereby committed to the Attorney General or his authorized representative for a term of imprisonment of 12 years pursuant to 18 USCA 5010(c).

THE COURT SPECIFICALLY FINDS that because of defendant's background, lack of guidance and train-

ing, his amoral, asocial and calloused attitude toward life and his responsibilities to himself and society, that he probably will not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of six years from the date of conviction and therefore the Court imposes this extended term of imprisonment for treatment and supervision and until discharged by the Division as provided in Section 5017(d) of Title 18.

IT IS STRONGLY RECOMMENDED that defendant be confined at separate institution from Gabriel Francis Antelope and from Leonard Francis Davison.

IT IS FURTHER STRONGLY RECOMMENDED that defendant be afforded and receive in-depth psychiatric, psychological and social study, treatment and counseling, as well as educational and skilled trade training.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Blaine Anderson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Cr. 2-74-15

UNITED STATES OF AMERICA

vs.

LEONARD FRANCIS DAVISON, DEFENDANT

JUDGMENT AND COMMITMENT

On this 14th day of June 1974 came the attorney for the government and the defendant appeared in person and with his counsels Scott Reed and John Walker, Esqs.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty of the offenses of burglary in violation of 18 USC 1153 and Idaho Code, Secs. 18-1401 and 18-1402, robbery in violation of 18 USC 1153 and 2111, and first degree murder in violation of 18 USC 1153 and 1111 as charged in Counts 1, 2 and 3 of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted,

The Court finds the defendant was 17 years of age at the date of conviction and is suitable for handling under the Federal Youth Corrections Act (18 USCA 5005-5024).

IT IS ORDERED AND ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment for life upon conviction of first degree murder and pursuant to 18 USC 1111 as to Count 3 and

for a term of imprisonment of 15 years on Count 2 pursuant to 18 USC 1153 and 2111 and for a term of imprisonment of 15 years on Count 1 pursuant to 18 USC 1153 and I.C. 8-1401 and 18-1402. Said terms of imprisonment are to run consecutively.

THE COURT SPECIFICALLY FINDS that because of defendant's background, lack of guidance and training, his amoral, asocial and calloused attitude toward life and his responsibilities to himself and society, that he probably will not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of six years from the date of conviction and therefore the Court imposes this extended term of imprisonment for treatment and supervision and until discharged by the Division as provided in Section 5017(d) of Title 18.

IT IS STRONGLY RECOMMENDED that the defendant and Gabriel Francis Antelope be confined at separate institutions during the respective periods of confinement.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Blaine Anderson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. Cr. 2-74-15

UNITED STATES OF AMERICA

v.

GABRIEL FRANCIS ANTELOPE, DEFENDANT

On this 14th day of June, 1974 came the attorney for the government and the defendant appeared in person and with his counsel, Allen Bowles, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty of the offenses of burglary in violation of 18 USC 1153 and Idaho Code, Secs. 18-1401 and 18-1402, robbery in violation of 18 USC 1153 & 2111, and first degree murder in violation of 18 USC 1153 & 1111 as charged in Counts 1, 2, and 3 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of life upon your conviction of first degree murder and pursuant to 18 USC 1111 as to Count 3 and for a term of imprisonment of 15 years on Count 2 pursuant to 18 USC 1153 and 2111 and for a term of imprisonment of 15 years on Count 1 pursuant to 18 USC 1153 and I.C.

18-1401 and 18-1402. Said terms of imprisonment are to run consecutively.

IT IS STRONGLY RECOMMENDED that the defendant and Leonard Davison be confined at separate institutions during their respective periods of confinement.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Blaine Anderson
United States District Judge

The Court recommend commitment to:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Cr. No. 2-74-15

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LEONARD FRANCIS DAVISON,
WILLIAM ANDREW DAVISON
and
GABRIEL FRANCIS ANTELOPE,
DEFENDANTS

ORDER MODIFYING SENTENCE

It appearing to the Court from the reporter's notes taken at the sentencing hearing, that the Court, through mistake and inadvertence, announced that the sentences imposed as to the three counts of the indictment were to run "consecutively" and it was the purpose and intent to impose concurrent sentences as to all three counts in view of the youthfulness of the defendant, Leonard Francis Davison, and other considerations, and it appearing to the Court that said sentence ought to be amended to reflect the true intent and purpose thereof, and pursuant to Rule 35, Federal Rules of Criminal Procedure

IT IS HEREBY ORDERED that the sentence this date imposed upon Leonard Francis Davison only be, and it is hereby modified and amended to provide that the sentences on all three counts shall run concurrently.

DATED this 14th day of June, 1974.

/s/ J. Blaine Anderson
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 75-661

UNITED STATES, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

ORDER ALLOWING CERTIORARI

Filed February 23, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 204243 235

Supreme Court, U. S.
FILED
JAN 12 1976
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No. 75-661

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ATTORNEY FOR DEFENDANT-RESPONDENT

ALLEN V. BOWLES,
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P. O. Box 8811,
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I N D E X

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October Term, 1975

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UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Allen V. Bowles, on behalf of Gabriel Francis Antelope, et al., submits respondents' brief in opposition to petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTIONS PRESENTED

1. Whether legislation affecting Indians and Indian country is racial in nature.

2. Whether, if the preceding question is answered in the affirmative, consistency in federal criminal law is such a proper governmental objective which justifies disparate treatment between Indians and non-Indians.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

The essence of the holding of the court of appeals in this case is that the government is not permitted to accomplish through discriminatory jurisdiction what it can not do through discriminatory statutory coverage when both Indian and non-Indian defendants are jurisdictionally covered.

The classification of Indians under 18 U.S.C. 1153 is racial in nature, invidious or capricious, and not related to a compelling governmental objective.

The Court's decision recognizes that consistency in federal criminal law is ordinarily a valid legislative objective, but such objective is subject to a citizen's right to equal treatment under the United

States Constitution.

1. There is little doubt that Congress has the right to grant federal jurisdiction over Indians, but not when it requires a substantive law to be applied which discriminates on the basis of race. The federal government can not succeed in discriminating on the basis of race procedurally where it is prohibited from discriminating on the basis of race substantively, just as states in several black-race cases were prohibited from skirting racial discrimination issues regardless of the manner.

It has long been recognized that substantive law supersedes procedural law when the two conflict. The rule of priority between substantive law and procedural law can not be applied to require federal substantive law to be applied when the distinction between application of federal substantive law and state substantive law is purely racial and the disparity of treatment is significant.

The disparity between I.C. 18-4003 and 18 U.S.C. 1111 and the lessening of the government's burden of proof creates a serious substantive disadvantage to the defendant. U.S. v. Cleveland, 503 F2d 1067 (1974).

The circuit courts that have addressed themselves to 18 U.S.C. 1153 cases and which held 18 U.S.C. 1153 to be constitutional have done so because the difference in wording between the federal statute and the comparable state statute has been only a difference in nomenclature, and not substantive law. The same elements have been present in both. U.S. v. Analla, 490 F2d 1204 (1974).

Conversely, where there is a significant difference between the federal statute and the comparable state statute which has worked to the Indians disadvantage, the circuit courts are in agreement that discrimination on the basis of race has occurred. In U.S. v. Boone, 347 F.Supp. 1031 (1972), the Court held that since the absence of the element of intent existed, rendering the prosecution's burden of proof less onerous under the federal substantive law than under the state substantive law and that the Major Crimes Act applied only to Indians, "an equal protection issue is squarely presented," at 1034.

This Court in Keeble v. U.S., 412 U.S. 205 at 212 (1973) stated much the same idea,

> "That is emphatically not to say, however, that Congress intended to

> deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant."

The principle of noncircumvention of discrimination by the use of procedural rules was broadly applied in Yick Wo v. Hopkins, 118 U.S. 356 (1886) wherein the Court stated,

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered . . . , so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Hence, the application of a constitutional law can become invalid either by administrative maneuvring or procedural inconsistencies.

2. 18 U.S.C. 1153 provides for a racial classification, "any Indian . . .", which classification invidiously discriminates against Indian defendants in Idaho based

solely on race by lessening the government's burden of proof for a first degree murder conviction. As Justice Stewart remarked in McLaughlin v. Florida, 379 U.S. 184 (1964), ". . . it is simply not possible for a state law (or in this case a federal law) to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." In the present case the degree or severity of the criminal act with which the defendant was charged was based solely on race.

There is no question that 18 U.S.C. 1153 is a racial classification. U.S. v. Cleveland, 503 F2d 1067 (1974); U.S. v. Analla, 490 F2d 1204 (1974); U.S. v. Boone, 347 Fed. Supp. 1031 (1972); Henry v. U.S., 432 F2d 114 (1970); Gray v. U.S., 394 F2d 96 (1967).

> ". . . it hardly needs to be observed that section 1153 is founded upon a racial classification and, as illustrated here, may in some respects result in further racial distinctions. It is also clear that racial classifications are constitutionally suspect, . . . and suspect to the most rigid scrutiny." Kills Crow v. U.S., 451

F2d 323 (1971).

Just as one can not elect to become a black, so one can not be adopted to become an Indian. 41 Am. Jur.2d 1. The racial characteristics of an Indian are everpresent in the man himself and the only additional requirement to come within the purview of 18 U.S.C. 1153 is that the alleged crime occurred within Indian country. 18 U.S.C. 1153 makes no provision for limiting its application to particular North American Indian tribes, however, it goes without argument that 18 U.S.C. 1153 would only apply to North American Indians who are American citizens. In U.S. v. Ives, 504 F2d 935 (1974), the Court stated,

> "Although Ives had requested that his name be removed from the rolls of the Colville tribe in 1969, it was not done. But enrollment or lack of enrollment is not determinative of Ives' status as an Indian." Ex Parte Pero, 99 F2d 28 (1938).

3. Once the statute in question has been determined to include a racial classification, then in accordance with McLaughlin, supra at 196,

"Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification. . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." (emphasis added).

Is wardship or consistency of Federal criminal law enforcement compelling governmental interests sufficient to sustain the racial classification in the present case?

A. The question of the guardian and ward relationship between the Federal government and the Indians as being reasonably related to any governmental interest has been previously decided in at least two circuit court decisions.

In U.S. v. Big Crow, 523 F2d 955 (1975) the Court held that the racial classification was not even rationally "tied to the fulfillment of Congress' unique obligation toward Indians."

"It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection."

id. at 959.

"In the case at bar, the racial differentiation in section 1153 results in disadvantages to the defendant and it is difficult to see any benefit to Indians generally. The racial classification is not reasonably related to any proper governmental objective and is therefore arbitrary and invidious in violation of the due process clause of the 5th Amendment."

Boone, supra, at 1035.

What guardian would subject its ward to harsher penalties or lesser burdens of proof on criminal indictment under the guise of protection of the ward? The wardship doctrine of 1885 is not so compelling in 1976 to allow racial discrimination on a per se basis as is made possible pursuant to the provisions of 18 U.S.C. 1153.

B. The issue of whether consistency of Federal criminal law enforcement is a compelling governmental interest sufficient to sustain the racial classification contained within 18 U.S.C. 1153 does not appear to have been previously decided.

The main purpose of the Major Crimes Act of 1885 was to prevent lawlessness. The same theme was reiterated in the adoption of Public Law 280, 18 U.S.C. 1162. Congress' intent has not been to apply federal substantive law to all crimes listed in the Major Crimes Act. The amendments of 1966 and 1968 have expressly designated certain crimes to be defined by state substantive law. Public Law 280, with its amendments, make possible state jurisdiction over all criminal cases. The policy is to assimilate the Indians into the states, without interfering with tribal law and sovereignty. This Court has previously indicated a similar desire to allow Indians to govern themselves where possible and practical.

The only reason federal jurisdiction is continued to any degree presently is the danger of state discrimination against Indians. The danger of discrimination is correctly resolved by application of federal procedure with state substantive law.

Uniformity and consistency are more completely in operation with the application of state substantive law and federal procedural law than the proposed federal blanket coverage. Total federal application of its

substantive laws is contrary to at least three previous United States Supreme Court decisions and Congress' current intent. see, New York ex rel. Ray v. Martin, 326 U.S. 496; Draper v. United States, 164 U.S. 240; United States v. McBratney, 104 U.S. 621.

The practical effect of the Ninth Circuit's holding is to alleviate the invidious racial discrimination of 18 U.S.C. 1153, to adhere to the present intent of Congress as exhibited by the 1966 and 1968 amendments to 18 U.S.C. 1153 and the amendments to Public Law 280, and to continue the current approach of the circuit courts decisions assimilating the Indians into the states social and judicial systems, without interfering with tribal law and sovereignty.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in the Supreme Court of the United States, and that the petition for a writ of certiorari should be denied.

ALLEN V. BOWLES,
Counsel for Respondent.

January, 1976.

CERTIFICATE OF SERVICE

All parties required to be served have been served by depositing three (3) printed copies of Brief of Respondent in Opposition to Petition for Writ of Certiorari in the United States post office with air mail postage prepaid, addressed to Mr. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, on the 9th day of January, 1976.

Allen V. Bowles

Allen V. Bowles,
Counsel for Respondent.

Supreme Court, U. S.
FILED
MAY 26 1976
MICHAEL RODAK, JR., CLERK

No. 75-661

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 523 F.2d 400.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 4, 1975. On September 28, 1975, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 3, 1975. The petition was filed on that day and was granted on February 23, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in legislating with regard to criminal offenses committed in Indian country, Congress may,

consistent with requirements of equal protection of the law, assert federal jurisdiction only with respect to offenses in which an Indian is involved either as accused or as victim, leaving to the States the prosecution of offenses entirely involving non-Indians (under laws that may differ from and in some particulars be more or less lenient than federal law).

2. Whether, if the preceding question is answered in the negative, 18 U.S.C. 1152 should be construed literally to encompass all offenses in Indian country, without distinction based upon the identity of the persons involved, thereby eliminating the possibility of disparate treatment arising from the status of the accused.

STATUTES INVOLVED

18 U.S.C. 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. 1152 provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or

assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. 1111 provides in pertinent part:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

* * * * *

Idaho Code § 18–4001 (1948) provides:

Murder defined.—Murder is the unlawful killing of a human being with malice aforethought.

Idaho Code § 18–4003 (1975 Cum. Supp.) provides:

Degrees of murder.—All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corpo-

ration or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence for murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 1, p. 588.]

Idaho Code § 18–4004 (1975 Cum. Supp.) provides:

Punishment for murder.—Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten (10) years and the imprisonment may extend to life. [As added by 1972, ch. 336, § 1, p. 844; amended 1973, ch. 276, § 2, p. 588.]

STATEMENT

1. In February 1974, four persons broke into Emma Johnson's house, which was within the boundaries of the Coeur d'Alene Indian Reservation in Idaho (within "Indian country" as defined by 18 U.S.C. 1151), robbed her, and killed her by kicking and beating her to death (Pet. App. 1a–3a; see also A. 6–9). Because the crimes involved Indians (here, the accused; Mrs. Johnson was not an Indian) and occurred in Indian country, and because they were offenses specifically enumerated in 18 U.S.C. 1153, the crimes came within the jurisdiction of the federal district court.

A federal grand jury returned an indictment against the respondents—Gabriel Antelope, Leonard Davison, and William Davison—and co-defendant Norbert Sey-

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ler. Count I of the indictment charged that Leonard Davison and Gabriel Antelope, enrolled Coeur d'Alene Indians, feloniously entered the house of Emma Johnson, a non-Indian, with the purpose to commit robbery. Count II charged that they forcibly took from her a purse of money belonging to her. Count III charged that they, with William Davison and Norbert Seyler, also enrolled Coeur d'Alene Indians, "with malice aforethought and in the perpetration of the robbery alleged in Count Two hereof, unlawfully and willfully did kill Emma Teresa Johnson * * * by beating [her] * * * with their fists and feet" (A. 4–5).

The respondents pleaded not guilty. After a jury trial in the United States District Court for the District of Idaho, respondents Antelope and Leonard Davison were convicted on all three counts, including first degree murder under Count III. Respondent William Davison was convicted solely of second degree murder under Count III (Pet. App. 2a–3a).[1]

Although the evidence appears to have been sufficient to have submitted to the jury a charge of premeditated murder (see A. 6–9), respondents were indicted and tried on a felony murder theory, per-

[1] After pre-sentence investigations, Antelope was sentenced to 15 years' imprisonment on each of Counts I and II and to life imprisonment on Count III, the sentences to run consecutively. Leonard Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act (18 U.S.C. 5010) for concurrent terms of 15 years on each of Counts I and II and for life on Count III. William Davison was sentenced to the custody of the Attorney General under the Youth Corrections Act for 12 years (A. 13–18). Seyler was granted immunity and testified at trial for the government. A portion of his testimony is set out at A. 6–9.

mitted by the applicable federal statutes (18 U.S.C. 1153 and 1111). Under the federal felony murder principle reflected in 18 U.S.C. 1111, a killing with malice aforethought, which would otherwise constitute second degree murder, will support a conviction for first degree murder if the killing is perpetrated during the commission of one of a specified list of felonies (here robbery). Thus, the jury was not required to find premeditation in order to convict respondents of first degree murder (see Instruction No. 34, A. 11).

2. The court of appeals reversed the convictions of murder. It noted that because the victim was a non-Indian, the accused, had they too been non-Indians, would not have been tried in federal court under federal law but would instead have been tried and punished under Idaho law (Pet. App. 4a). Under Idaho law, a defendant may be convicted of first degree murder only upon proof of premeditation and deliberation concerning the murder (Idaho Code § 18–4003 (1975 Cum. Supp.)).[2] As noted above, under federal law applicable to this case no showing of premeditation was required to convert respondent's killing of Mrs. Johnson with malice aforethought in the course of a robbery from second degree murder to first degree murder.

The court of appeals concluded that "the *sole* basis for the disparate treatment of appellants and non-Indians is that of race" (Pet. App. 6a; emphasis in original). It stated that the defendants, by being tried under federal law rather than state law, were "put at

[2] In which event there is a mandatory death sentence, Idaho Code § 18–4004 (1975 Cum. Supp.), pp. 4–5, *supra*.

a serious racially-based disadvantage" (*id.* at 14a) that could not be justified under the government's wardship over Indians and that accordingly the conviction violated the equal protection concept implicit in the Due Process Clause of the Fifth Amendment. The court thus held the murder provision of 18 U.S.C. 1153 unconstitutional as applied in this case. The court cautioned that it was not holding the felony murder provision of 18 U.S.C. 1111 unconstitutional (Pet. App. 15a), but that "Indians' rights to due process and equal protection under the Fifth Amendment require that they not be treated worse than similarly situated non-Indians" (*id.* at 14a).[3]

SUMMARY OF ARGUMENT

I.

The court of appeals has erroneously characterized the respondents' convictions of first degree murder as impermissible racial discrimination. The respondents were convicted under 18 U.S.C. 1111, the federal enclave murder statute, which is applicable to all persons charged with homicide within federal criminal jurisdiction, regardless of race or status. The possibil-

[3] Since respondent William Davison was convicted only of second degree murder, the elements of which appear to be identical under federal and Idaho law (both 18 U.S.C. 1111 and Idaho Code §§ 18–4001, 18–4003, define second degree murder as "the unlawful killing of a human being with malice aforethought"), no reason appears in the decision of the court of appeals for reversing his conviction. Nevertheless, this apparent oversight on the part of the court of appeals presents no question of broad importance for this Court, and our petition as to this respondent was confined to the common grounds raised as to all three respondents.

ity of different treatment when non-Indians commit crimes against other non-Indians in Indian country exists only because such crimes are outside the reach of existing federal criminal statutes. *New York ex rel. Ray* v. *Martin,* 326 U.S. 496; *Draper* v. *United States,* 164 U.S. 240; *United States* v. *McBratney,* 104 U.S. 621. Thus, this case does not present the question whether Congress may constitutionally provide that Indians may be convicted of felony-murder but similarly situated non-Indians may not. Rather the question is whether Congress may, without violating equal protection concepts, assert exclusive jurisdiction over crimes within Indian country involving Indians as perpetrators or victims, while leaving to the States, under laws that will inevitably differ in some respects from federal law, the trial of crimes within Indian country in which no Indians are involved.

A. This division of responsibility between state and federal jurisdiction is constitutionally valid. It has been continually recognized by decisions of this Court. It is a rational allocation of jurisdiction, providing federal jurisdiction where there is a federal trust responsibility and state jurisdiction where no federal or Indian interest is involved. Because of the substantial non-Indian population within Indian reservations, the division serves a particularly useful function today.

If the division of jurisdiction is valid, it follows that Congress need not define crimes within its sphere of jurisdiction in a fashion conforming to the definitions in the various States in which reservations are located. Yet the decision of the court of appeals creates the anomaly that although Congress may elect to

legislate as to crimes involving Indians either as perpetrators or victims, leaving other crimes on the reservation to state jurisdiction, its law is not supreme, but must conform to, or at least be no less lenient than, state law. But Congress, having authority to legislate on a matter, need not extend its legislation to its Constitutional limits, nor need it conform its scheme of regulation to state regulation. Decisions of this Court as to legislation concerning interstate commerce and other analogous subjects make this clear. Moreover, nothing in the decisions relied upon by the court of appeals requires the comparison with state law improperly mandated by the court of appeals; those decisions were addressed to the need for even-handed application of federal power to defendants tried in federal court, and it is undisputed that the trial of any person in federal court for a murder committed in Indian Country is governed by uniform federal law.

B. Respondents' convictions do not rest upon an impermissible racial classification. To begin with, their convictions were obtained under a statute applicable to any homicide within federal criminal jurisdiction, regardless of the race of the defendant. Moreover, as this Court has noted, the regulation of Indian affairs by the federal government does not derive from race but from the former independence of the Indian tribes and their conquest by the United States, which then assumed a special trust responsibility for them. Providing for federal and tribal jurisdiction over criminal matters where Indians' interests are at issue (but not where they are not) is an important exercise of

this trust responsibility. It is not a racial discrimination. Persons racially Indian but having no connection with a tribe under trust responsibility are unaffected by such statutes.

C. The principle adopted by the court of appeals leads to confusion or impossibility in the enforcement of criminal law in Indian country. The decision appears to require a comparison of state and federal law to see which is more lenient, with federal law inapplicable in whole or part whenever state law is more lenient. Heretofore clear federal laws, applicable throughout federal jurisdiction, have governed the trial of homicides and other serious crimes within federal Indian country jurisdiction. In comparing these laws with state laws, it is often impossible to determine which is more lenient. For instance, here, Idaho law does not provide for felony murder but does provide a mandatory death penalty. It is not obvious that the court of appeals was correct in characterizing the state law as more "lenient." Nor is it accurate to equate "leniency" with the "Indian interest." Finally, if such comparisons are required, state prosecutions of non-Indians for crimes committed against other non-Indians within Indian reservations are also cast in doubt when the federal law is more lenient. The substantial adverse impact of the court of appeals' decision on prospects for rational and effective law enforcement in Indian country serves, we submit, to illuminate the rationality of the historic allocation of state and federal jurisdiction heretofore sanctioned by this Court.

As a practical matter, if the analysis of the court of appeals is correct, Congress would be forced either to assert exclusive federal jurisdiction over all offenses occurring in Indian country, thereby increasing federal responsibility beyond the needs of its trusteeship, or to provide that all offenses be governed by state law under an assimilative crime principle, thereby being forced to renounce the supremacy of federal law in a field of federal responsibility. It is far from obvious that either development would lead to more equitable or more rational law enforcement in Indian country.

II.

On its face, 18 U.S.C. 1152 requires the application of general federal enclave law to all offenses committed in Indian-country, even those entirely between non-Indians. In *McBratney* and other cases this Court interpreted Congress' intent in enacting predecessors of 18 U.S.C. 1152 as not extending federal jurisdiction to crimes between non-Indians. If that interpretation leads to unconstitutional results because of the division of jurisdiction, the Court should reconsider its decisions in *McBratney* and its progeny. We do not consider such an extension of federal jurisdiction to be necessarily desirable, but it could be preferable to the uncertainties caused by the impact of the decision of the court of appeals upon the present regime of divided state-federal jurisdiction.

ARGUMENT

I.

RESPONDENTS WERE NOT DENIED EQUAL PROTECTION OF THE LAWS

The proper starting point for evaluation of any claimed deprivation of equal protection of the laws is a correct identification of the "discrimination" that has allegedly taken place. It is in that respect that we have perhaps our most fundamental disagreement with the analysis of the court of appeals. In essence, according to the court, this case involves a discriminatory definition of the offense of first degree murder based solely on the race of the defendant (Pet. App. 6a–7a). While the court recognized that the discrimination it had identified arose from the lack of federal court jurisdiction over the offenses with which respondents' offenses were being compared (*id.* at 11a), it stated that "[t]he government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage when both Indian and non-Indian defendants are jurisdictionally covered" (*id* at 12a).

The court of appeals' use of the active voice in describing the "discrimination" involved in the instant case creates, we submit, an inaccurate impression of the relevant statutory provisions at issue. The statute under which respondents were convicted of murder in the first degree, 18 U.S.C. 1111, applies to all persons charged with homicide in the special maritime and territorial jurisdiction of the United States (which, by operation of Sections 1152 and 1153, includes Indian country), regardless of race, national

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origin, political status, or any other characteristic. In other words, any person who commits murder in the course of a robbery taking place on a military base or a vessel of the United States on the high seas—whether Indian or non-Indian—is equally liable to conviction for murder in the first degree. The same is true in the case of the killing of an Indian in Indian country.

In short, nothing anywhere in the United States Code affirmatively provides for different treatment of Indians and non-Indians charged with murder. The possibility of differential treatment arises only because, out of the entire universe of murderers potentially subject to federal court jurisdiction and to the application of substantive federal law by virtue of the geographical location of their offense, one group—non-Indians who commit crimes against other non-Indians in Indian country—is outside the reach of the present federal statutes governing crimes committed in Indian country. *New York ex rel. Ray* v. *Martin,* 326 U.S. 496; *Draper* v. *United States,* 164 U.S. 240; *United States* v. *McBratney,* 104 U.S. 621. This limited withholding of federal jurisdiction is, as we show within, eminently sensible. Moreover, the statutory framework as so construed remains entirely neutral on its face. No different standards are prescribed, either more severe or more lenient, for non-Indians committing offenses against other non-Indians in Indian country; the matter is simply left for disposition by the courts of the State in which the offense occurred, in accordance with the law of that State governing like crimes committed (by Indians as well as non-Indians) elsewhere in the State.

Thus, this case does not present the question whether Congress may constitutionally provide that Indians may be convicted of felony-murder but similarly situated non-Indians may not. Rather, the question presented is whether Congress may, without violating equal protection concepts, assert exclusive federal jurisdiction over crimes committed in Indian country involving an Indian as perpetrator or victim while leaving to the States, under procedural and substantive rules that will inevitably differ in at least some respects from those established by Congress for federal cases, the trial of crimes in which no Indian is involved.[4] We argue below that this selective and facially neutral exercise of federal jurisdiction is constitutionally proper and is in accordance with principles long recognized by this Court, that it does not amount to an impermissible racial classification, and that its abandonment would seriously impede prospects for rational law enforcement in Indian country.

[4] This case thus differs significantly from *United States* v. *Cleveland,* 503 F. 2d 1067 (C.A. 9), on which the court below relied (Pet. App. 9a–12a). See discussion at pp. 31–32, *infra.*

A. THE EXISTING ALLOCATION OF FEDERAL AND STATE JURISDICTION OVER OFFENSES COMMITTED IN INDIAN COUNTRY, PREVIOUSLY APPROVED BY THIS COURT, IS CONSTITUTIONALLY VALID

18 U.S.C. 1152 and its statutory predecessors[5] appear on their face to make federal law applicable to all crimes committed by non-Indians within Indian country,[6] while reserving to tribal jurisdiction some crimes committed by Indians. The Major Crimes Act (18 U.S.C. 1153), in turn, provides federal jurisdiction over 13 major crimes when committed by Indians in Indian country, including the crime of murder as defined by 18 U.S.C. 1111,[7] thus providing full federal and tribal jurisdiction over crimes within Indian

[5] 18 U.S.C. 1152 stems from the Act of June 30, 1834, 4 Stat. 733, as amended by the Act of March 27, 1854, 10 Stat. 269, 270, which was incorporated in the Revised Statutes as Sections 2145 and 2146. Section 2145, in language substantially identical to 18 U.S.C. 1152, provided that "[e]xcept as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

The second paragraph of 18 U.S.C. 1152 (R.S. 2146) provides that the section "shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribes * * *."

[6] "Indian country" is defined in 18 U.S.C. 1151, see p. 2, *supra*.

[7] Other crimes committed by Indians are left to tribal jurisdiction (see *Keeble* v. *United States*, 412 U.S. 205, 209–212), except for crimes not dependent on the territorial jurisdiction of the United States (see *Head* v. *Hunter*, 141 F.2d 449 (C.A. 10); *Walks on Top* v. *United States*, 372 F.2d 422 (C.A. 9), certiorari denied, 389 U.S. 879), and certain victimless crimes that are punished under federal misdemeanor laws if not previously punished by the tribe. See 18 U.S.C. 1152, para. 2.

country. But over the course of years, this Court has read these statutes as not encompassing crimes by non-Indians against non-Indians, even though such offenses occur within Indian country. *United States* v. *McBratney,* 104 U.S. 621; *Draper* v. *United States,* 164 U.S. 240; *New York ex rel. Ray* v. *Martin,* 326 U.S. 496. See *Williams* v. *Lee,* 358 U.S. 217, 219–220; *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 170–171.

What has thus emerged is a coherent overall structure, under which full recognition is given to the paramount federal and tribal responsibility for regulation when Indians or Indian interests are involved, while the jurisdiction of the State may be recognized over events occurring within its borders and not implicating Indian interests, even though the events may take place in Indian country. It is this division of jurisdiction that, according to the holding of the court of appeals in the instant case, has created a constitutionally impermissible discrimination. We begin, therefore, with a brief review of the evolution by this Court of the principles here found by the court of appeals to be unconstitutional in their application.

1. "From almost the beginning, the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized." *Board of Commissioners* v. *Seber,* 318 U.S. 705, 715. The origin and nature of this power were described by the Court in *Seber* as follows (318 U.S. at 715):

> This power is not expressly granted in so many words by the Constitution, except with respect

> to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

See also *Morton* v. *Mancari,* 417 U.S. 535, 551.

Since the seminal decision in *Worcester* v. *Georgia,* 6 Pet. 515,[8] the Court has repeatedly nullified state laws affecting Indians that either conflicted with "governing Acts of Congress" or "infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 220; *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148. It has by similar token upheld federal laws implementing Congress' wardship responsibility against claims of encroachment on state sovereignty. See, *e.g., United*

[8] In *Worcester* v. *Georgia*, the Court through Chief Justice Marshall, invalidated Georgia's prosecution of a non-Indian for living on an Indian reservation without a license from the State. The Court concluded (6 Pet. at 560):

"The Cherokee nation * * * is a distinct community, occupying its own territory, * * * in which the laws of Georgia can have no force, * * * but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."

States v. *Kagama,* 118 U.S. 375; *Donnelly* v. *United States,* 228 U.S. 243; *United States* v. *McGowan,* 302 U.S. 535; *United States* v. *Mazurie,* 419 U.S. 544.

But while this Court has consistently recognized the plenary power of Congress over Indian affairs, it has also been careful to point out that this power does not of itself divest the States of jurisdiction over events occurring in Indian country within their borders. In *Surplus Trading Company* v. *Cook,* 281 U.S. 647, 651, the Court stated the governing rule to be that the Indian reservations "are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." More particularly, in *Williams* v. *Lee, supra,* 358 U.S. at 219–220, the Court reviewed cases in which it had "modified" the principle of exclusive federal jurisdiction over Indian country to permit state jurisdiction where "essential tribal relations were not involved." Recently, in *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 170–171, the Court noted that "the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has [not] remained static during the 141 years since *Worcester* was decided;" rather, "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."

2. The general balance between state and federal power that has evolved, permitting state jurisdiction within Indian country whenever Indian interests are

not at stake, holds true in the case of criminal offenses as well as in civil matters. Indeed, the principles expounded in *Williams* and *McClanahan* derived in large part[9] from this Court's decisions in *United States* v. *McBratney,* 104 U.S. 621, *Draper* v. *United States,* 164 U.S. 240, and their progeny, which established the allocation of jurisdiction over criminal offenses that the court of appeals concluded in the instant case created an unconstitutional discrimination.

Both *McBratney* and *Draper* involved attempts by the federal government to prosecute a non-Indian for the murder of another non-Indian in Indian country. Jurisdiction for the prosecution in federal court was invoked under R.S. 2145, which (like its modern successor, 18 U.S.C. 1152) appeared to authorize federal jurisdiction over all crimes occurring on Indian reservations, apart from those crimes reserved to tribal jurisdiction. The defendants contended, however, that federal jurisdiction should not be found because the original form of R.S. 2145 (Act of June 30, 1834, see note 5, *supra*) did not concern Indian country within the confines of any State, but rather those areas west of the Mississippi River within the territories of the United States. A law designed for federal territories should not, it was argued, be automatically applied in the same fashion to Indian country within the boundaries of a State.

Rather than simply construing the language of R.S. 2145, therefore, the Court began its consideration with

[9] See *Williams*, *supra*, 358 U.S. at 219–220; *McClanahan*, *supra*, 411 U.S. at 171.

the treaties governing relations between the federal government and the respective tribes prior to statehood, together with the enabling legislation providing for admission of the States (Colorado and Montana, respectively) into the Union. The treaties had contained no provision for the punishment of offenses wholly involving non-Indians (*McBratney, supra,* 104 U.S. at 622, 624, *Draper, supra,* 164 U.S. at 243). Thus, the Court framed the issue as whether the enabling acts manifested a Congressional purpose to reserve federal jurisdiction over Indian land, including crimes entirely between non-Indians, "thereby divesting the State *pro tanto* of equal authority and jurisdiction over its citizens, usually enjoyed by the other States of the Union" (*Draper, supra,* 164 U.S. at 242).

In *McBratney,* the Court found nothing in the Colorado enabling act (Act of March 3, 1875, 18 Stat. 474) denying the State jurisdiction over crimes between non-Indians committed on an Indian reservation (104 U.S. at 623); it held that, as Congress had not affirmatively asserted jurisdiction over such crimes, that jurisdiction was reserved to the State by virtue of its admission into the Union upon an equal footing with the original States.[9a]

[9a] The Court has subsequently refused to construe *McBratney* as holding that R.S. 2145 was repealed in its entirety as States were admitted into the Union, thereby divesting the federal government of jurisdiction even over crimes by or against Indians on the reservation within the State's borders, unless express language in the enabling act or governing treaty reserved each jurisdiction. In *Donnelly* v. *United States*, *supra*, 228 U.S. at 271, the Court noted that in *McBratney* and *Draper* "the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves," and the *Donnelly* Court held that "[u]pon full consideration we are satisfied that offenses committed by or

The Montana enabling act at issue in *Draper* (Act of February 22, 1889, 25 Stat. 676) differed from that in *McBratney* in providing that the people of Montana "forever disclaim all right * * * to [Indian Lands] * * * and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *" (164 U.S. at 244). The Court interpreted this language as manifesting Congress' intent to negate any "implication" that the newly-passed allotment acts would subject "the Indians themselves * * * [to] the authority and control of the State" (*id.* at 246) but not any intent to preclude state jurisdiction over criminal acts between non-Indians occurring on Indian lands or reservations. The Court concluded (*id.* at 247; emphasis supplied):

> It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union * * * demonstrates that in reserving to the United States jurisdiction and control over Indian lands *it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians.*

It is likely that the allotment acts were one factor disposing the Court to reaffirm the holding of *McBratney* despite the stronger disclaimer of the Montana enabling act. The General Allotment Act of 1887, 24 Stat. 388, had been designed in part to "open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour* v. *Superintendent,* 368 U.S. 351, 356; *Mattz* v. *Arnett,* 412 U.S. 481, 496–497. The resulting settlement of increasing numbers of non-Indians on the reservations provided additional justification (both in terms of the State's interest in uniformly applying its laws to all its citizens and in terms of the growing burden on federal law enforcement agencies on the reservation) for permitting the States to exercise jurisdiction over crimes on the reservation that did not directly affect Indians. That justification, we would add, has lost none of its force with the passage of time. Today it is common to find that the majority of persons residing within an Indian reservation are non-Indians. For example, the Department of Interior estimates that some 450 enrolled Indians and some 2,500 non-Indians live on the Coeur d'Alene Reservation, where the respondents murdered Mrs. Johnson.[10]

against Indians are not within the principle of the *McBratney* and *Draper* Cases." See also *United States v. Kagama*, 118 U.S. 375. The Coeur d'Alene reservation, like that in *Donnelly*, was created by executive order. Executive Order of June 14, 1867, modified by Executive Order of November 8, 1873 (Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, 835–837).

[10] While some reservations have a predominantly Indian population, *e.g.*, Navajo Reservation: Indian population 54,515, non-Indian 6,866 (89% Indian); Red Lake Reservation: Indian population 2,538; non-Indian 212 (92% Indian), many reservations have a non-Indian majority, *e.g.*, Flathead Reservation; Indian population 2,663, non-Indian 12,831 (17% Indian); Wind River Reservation: Indian population 3,511, non-Indian 11,938 (23% Indian) (see *United States* v. *Mazurie*, *supra*). Figures supplied by the Department of Interior based on 1970 census.

The Court has subsequently reinforced the *McBratney* and *Draper* holdings. In *New York ex rel. Ray* v. *Martin, supra,* involving a murder between non-Indians on a reservation in New York, an original State, the Court noted that *McBratney* "has since been followed by this Court and its holding has not been modified by any act of Congress" (326 U.S. at 498). The Court held that "in the absence of a limiting treaty obligation or Congressional enactment *each* state [has] a right to exercise [criminal] jurisdiction over Indian reservations within its boundaries" (*id.* at 499; emphasis added). Moreover, replying to the argument that R.S. 2145 (now 18 U.S.C. 1152) manifested an assertion of federal jurisdiction even over non-Indian offenses in Indian country, the Court stated: "* * * the *McBratney* line of decisions stands for the proposition that States, by virtue of their statehood, have jurisdiction over such crimes notwithstanding § 2145." *Id.* at 500; see also *Williams* v. *Lee, supra,* 358 U.S. at 220.

In sum, it is the involvement of an Indian as victim or perpetrator—that is, a direct federal guardianship interest—that activates federal jurisdiction over crimes in Indian country. The division of jurisdiction thus created respects the competing interest of federal and state sovereignty and has the additional advantage of reducing the burden on federal courts and federal law enforcement agencies in a sizeable number of cases in which Indian interests are affected either marginally or not at all. While we do not doubt Congress' authority to bring the entire population of an Indian reservation under federal criminal jurisdiction, if it finds this necessary for the protection of its Indian wards,[11] the decision not to assert jurisdiction over crimes between non-Indians is a reasonable one.

Accordingly, while the *McBratney* line of cases has been criticized by some commentators as reflecting a misreading of the original intent of Congress,[12] it also reflects a long-standing, rational, and judicially approved division of jurisdiction between the federal government, in the exercise of its role as guardian of Indian tribes, and the States, in the exercise of their "legitimate interests in regulating the affairs of non-Indians" (*McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 170–171).

3. It is clear from the foregoing that to the extent respondents were tried under different laws from those that would have governed the trial of a hypothetical non-Indian murdering another non-Indian, it is solely because their acts were within federal jurisdiction, whereas, had there been no Indian involvement, the offense would have been exclusively within state jurisdiction. There is, as pointed out at pp. 13–14, *supra,* no basis for a claim that anyone committing acts within federal jurisdiction, whether Indian or non-Indian, would have been treated in any different fashion from respondents.

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[11] See *e.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 553–556; see also the discussion at pp. 42–45, *infra.*

[12] See Davis, *Criminal Jurisdiction over Indian Country in Arizona*, 1 Ariz. L. Rev. 62, 70 (1959); Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 Utah L. Rev. 206, 208. As we have shown, however, because the original predecessor of 18 U.S.C. 1152 was an act applicable to territories, not States, there may have been no misreading.

Inherent in this or any other division of jurisdiction is the likelihood that the controlling substantive and procedural law will vary in some particulars between the two systems, since they are enacted by different sovereigns as parts of different regulatory structures. But if it be accepted that the line between state and federal jurisdiction over crimes in Indian country may lawfully be drawn based upon whether an Indian was in any way involved, then, we submit, it follows that Congress need not define crimes (here the crime of murder) within its sphere of jurisdiction in a fashion conforming to the definition of similar crimes by the various States within which reservations may be located.

The decision of the court of appeals, however, would seem to require just that result. True, the court does not purport to challenge the plenary authority of Congress over Indian affairs, nor, of course, to question the command that the laws and treaties made by Congress under the Constitution "shall be the supreme Law of the Land" (Art. VI, cl. 2). Yet its decision creates the anomaly that although Congress may elect to legislate as to crimes involving Indians either as perpetrator or victim, leaving other crimes on the reservation to state jurisdiction, its legislation in this regard is not supreme but must conform to, or at least must be no less lenient than, the equivalent state legislation.

The court of appeals attempts to justify this anomalous result by stating (Pet. App. 12a) that "[t]he government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage when both

Indian and non-Indian defendants are jurisdictionally covered." But this Court has repeatedly upheld a jurisdictional division based on whether an Indian interest is at stake and more specifically, in criminal law, on whether an Indian is either victim or perpetrator. There is plainly a rational basis for this allocation of jurisdiction, and we submit that it follows that any incidental differences in treatment that result from this valid division of jurisdiction are constitutionally permissible.

The soundness of this view is reinforced by reference to other areas in which the Constitution confers upon Congress powers comparable to those it enjoys with respect to Indian affairs. Whenever Congress has plenary power over a subject (e.g., interstate commerce), with the concomitant responsibility to determine how far to exercise that power, it can always be shown that assertion of federal power to a particular extent permits a disparity in federal-state treatment of like cases that could have been avoided by a more restricted or a more sweeping assertion of federal jurisdiction. But so long as the line is drawn rationally, as this Court has consistently considered this line to have been drawn, the resultant disparities afford no ground for a claim of denial of equal protection.

With respect to the Commerce Clause, for example, this Court has noted that "[i]t is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power" (*Currin* v. *Wallace*, 306 U.S. 1, 14) and "may choose, as it has chosen frequently in the past, to regulate only part of what it

constitutionally can regulate, leaving to the States activities which, if isolated, are only local" (*Kirschbaum* v. *Walling,* 316 U.S. 517, 521). If "the legislators * * * have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce" (*Katzenbach* v. *McClung,* 379 U.S. 294, 304), the courts do not question the legislative judgment that a particular activity falls within or outside of the federally-regulated class.

The federal gambling statute, 18 U.S.C. 1955, affords an example. Congress found that illegal gambling as an aspect of organized crime affects interstate commerce, but it subjected to federal jurisdiction only those operations that, in addition to violating state law, are conducted by five or more persons and either operate for more than thirty days or have a gross revenue in excess of $2,000 in any single day; the rest it left to state regulation. While Congress could have concluded that gambling operations of whatever magnitude, when viewed together, affect commerce and therefore require federal regulation, and while, conversely, some operations that fall within the federal statute may as a practical matter have no more effect on commerce than operations that Congress has left to state regulation, the courts have consistently held that in defining the federal offense as it did Congress acted reasonably. See, *e.g., Schneider* v. *United States,* 459 F.2d 540, 541–543 (C.A. 8), certiorari denied, 409 U.S. 877; *United States* v. *Sacco,* 491 F.2d 995, 999–1001 (C.A. 9).[13]

[13] In *Perez* v. *United States*, 402 U.S. 146, this Court rejected the argument that Congress' power over commerce did not authorize it to make federal the historically local crime of loan sharking. The Court concluded that Congress had a rational basis for outlawing as a class "extortionate credit transactions," including small-time operations whose effect on commerce, viewed in isolation, was not likely to exceed that of numerous crimes traditionally left to state regulation. The Court emphasized that it is not the function of the courts "to excise, as trivial, individual instances" of the class of activities that Congress has chosen to regulate (*id.* at 154). The Court thus reaffirmed the principle that, subject only to the requirement of reasonableness, it is for Congress to exercise its plenary power over commerce to the extent it sees fit, taking into account both its responsibilities and the traditional functions of the States.

In yet another area this Court has affirmed the principle that Congress is not required to exercise fully a plenary power given it by the Constitution. In *Palmore* v. *United States*, 411 U.S. 389, the Court rejected a claim that Congress could not constitutionally create a separate court system for the District of Columbia, consisting of judges who did not enjoy the tenure and salary protections of Article III judges, to hear cases arising under local law. The Court pointed out that, while Article III empowered Congress to create a system of lower federal courts, it did not require it to do so, "[n]or, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III" (411 U.S. at 401). On the contrary, the Court continued, both Congress and the Court had recognized "that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment," of which the District of Columbia was an instance (*id.* at 407–408).

In the instant case, similarly, Congress has concluded that in the case of crimes occurring on an Indian reservation but involving only non-Indians, its plenary power over Indian affairs should give way to accommodate the legitimate interest of the States in regulating the conduct of their citizens.

In the instant case, similarly, Congress' plenary power over Indian affairs includes the discretion to exercise the power in regard only to crimes on the

reservation that affect "essential tribal relations," leaving other crimes on the reservation to state regulation. Its decision that crimes entirely involving non-Indians, albeit occurring on the reservation, do not affect those essential relations is a reasonable one. Given the validity of that decision, the fact that federal and state sovereignties may define or punish substantially the same act (*e.g.*, murder) differently in some details is of no constitutional significance.[14]

4. Nothing in the cases relied upon by the court below requires a comparison of law within federal jurisdiction to law within state jurisdiction. In *Keeble* v. *United States,* 412 U.S. 205, the Court was con-

[14] Because respondents' equal protection claim rests upon the identity of the victim (if the victim had been Indian, any perpetrator would be tried under federal law) this Court's decision in *United States* v. *Feola*, 420 U.S. 671, is instructive. There the Court held that a conviction for assaulting a federal officer did not require proof of the defendant's knowledge of the official identity of his victim, adding that its decision "poses no risk of unfairness to defendants. It is no snare for the unsuspecting," since the perpetrator of such a crime "knows from the outset that his planned course of conduct is wrongful." (*Id.* at 685). The Court continued (*ibid*):

"The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of judicial forum."

Here, as in *Feola*, respondents' case is not one in which "legitimate conduct becomes unlawful solely because of the identity of the individual * * * affected," and, also as in *Feola*, there is no real injustice in treating respondents the same way others would be treated who committed the same acts within federal jurisdiction rather than comparing their situation to a hypothetical non-Indian tried under exclusive state jurisdiction.

cerned with statutory interpretation, specifically, whether the Major Crimes Act (18 U.S.C. 1153) permits federal rather than tribal jurisdiction over lesser included offenses once the federal court has assumed jurisdiction over a major offense listed in the Act. In considering this question, the Court pointed to the government's concession that a non-Indian committing the same offense (assault with intent to commit serious bodily injury) and tried under 18 U.S.C. 1152 would have been entitled to the instruction (412 U.S. at 208–209). But the comparison was of crimes both of which would have been tried in federal courts under federal Indian country jurisdiction, since the victim was an Indian. The focus in *Keeble* thus was on the situation in which, because of a narrow statutory interpretation, the rights afforded a defendant in a federal prosecution would vary depending upon the status of the defendant. There was no comparison with results under state jurisdiction, and there is nothing in *Keeble* which suggests that, so long as federal jurisdiction is exercised in an internally non-discriminatory manner, the Constitution invalidates federal laws that differ from (or are stricter than) state laws applicable in cases outside federal jurisdiction.

For much the same reasons, the Ninth Circuit's prior decision in *United States* v. *Cleveland,* 503 F.2d 1067, relied upon by the court below (Pet. App. 9a–11a), does not support the court's result here. In *Cleveland,* the court held that an amendment to 18 U.S.C. 1153 providing that aggravated assaults by Indians should be defined and punished in accordance

with state law was unconstitutional as applied in that case, because it subjected the Indian defendant to more severe penalties than a non-Indian committing the same offense would receive in a trial in federal court under the reference of 18 U.S.C. 1152 to federal enclave law. See also *United States* v. *Big Crow,* 523 F.2d 955 (C.A. 8), certiorari denied, No. 75–5786, February 23, 1976; but see *United States* v. *Analla,* 490 F.2d 1204 (C.A. 10), vacated, 419 U.S. 813. The court was concerned with a disparity between the treatment of Indian and non-Indian defendants *both within federal Indian country jurisdiction* as delimited in *McBratney.* Indeed, the court rejected due process claims based on a comparison with a crime entirely between non-Indians, finding no difference in the applicable law but also citing *McBratney* and its successors as establishing that "Congress could not have asserted federal jurisdiction to define the crime or to prescribe the punishment for non-Indian assaults on non-Indians." 503 F.2d at 1070–1071. Whether or not *Cleveland's* conclusion as to Congressional power is sound, the decision is no authority for the proposition that the federal jurisdiction exercised in 18 U.S.C. 1152 and 1153, when internally uniform, must also be conformed to state law. [15]

In sum, the potential disparity in the treatment of respondents and a hypothetical non-Indian who kills another non-Indian on an Indian reservation derives

[15] The government has sponsored a bill, S. 2129, 94th Cong. 1st Sess. (1975), which provides identical definitions for crimes punished by 18 U.S.C. 1153 and 18 U.S.C. 1152 and which would thus correct the *Cleveland* problem. The bill was passed on May 21, 1976, and is awaiting presidential signature.

from a jurisdictional allocation which this Court has consistently acknowledged to be reasonable. Thus, whether or not Idaho requires proof of an additional element for a conviction of murder in the first degree, respondents' murder convictions under federal enclave law were valid.

B. FEDERAL LEGISLATION CONCERNING INDIANS DOES NOT REST UPON AN IMPERMISSIBLE RACIAL CLASSIFICATION

Despite its apparent recognition of the validity of the jurisdictional allocation established by the relevant statutes, the court of appeals nevertheless reversed the convictions here because it found that "the *sole* basis for the disparate treatment of [respondents] and non-Indians is that of race" (Pet. App. 6a; emphasis in original) and concluded that this "racially-based disadvantage" could not be justified by the government's wardship over the Indians (Pet. App. 12a–14a). As we have pointed out, respondents were tried under the same murder statute applicable, regardless of the race of the defendant, to any murder within federal jurisdiction. Moreover the court of appeals' argument rests upon a misconception of the nature of the federal government's relationship to the tribal Indians. It fails to recognize that "in dealing with Indians the Federal Government is dealing primarily not with a particular race as such but with members of certain social-political groups toward which the Federal Government has assumed special responsibilities" (Cohen, *Handbook of Federal Indian Laws* 5 (1940 ed.)).

1. The regulation of Indian affairs by the federal government, as this Court has repeatedly noted, grows

out of the former independence of the Indian tribes and their conquest by the United States, which then assumed a trust responsibility for them. *Cherokee Nation* v. *Georgia,* 5 Pet. 1; *United States* v. *Kagama,* 118 U.S. 375; *Board of County Commissioners* v. *Seber,* 318 U.S. 705; *Morton* v. *Mancari,* 417 U.S. 535; *United States* v. *Mazurie,* 419 U.S. 544.

In view of the special relationship between the federal government and tribal Indians, this Court has previously upheld federal Indian legislation against claims that it discriminated either for or against Indians. In *Morton* v. *Mancari,* for example, the Court upheld a Bureau of Indian Affairs hiring preference in favor of Indians, concluding that the preference was an employment criterion "reasonably designed to further the cause of Indian self-government" (417 U.S. at 554); it also observed that the practice was "not even a 'racial' preference" but was directed by its terms to members of "federally recognized" tribes and thus was "political rather than racial in nature" (*id.* at 553 n. 24).

In *Fisher* v. *The District Court,* No. 75–5366, decided March 1, 1976, the Court considered an equal protection claim in a jurisdictional context not unlike the instant one. The issue was whether a federally approved tribal ordinance conferring on tribal courts exclusive jurisdiction over adoptions among tribal members impermissibly denied an Indian plaintiff access to the state courts. In rejecting the claim that it did, the Court explained (slip op. 8):

> The exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff

> but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton* v. *Mancari,* 417 U.S. 535, 551–555 (1974).

Similarly, 18 U.S.C. 1151, 1152, and 1153, which define "Indian country" and, as interpreted by this Court, partition jurisdiction over crimes within Indian country between the federal government, the tribes, and the States are essentially not racial statutes. Indian country is defined in terms of reservations, trust allotments, and dependent Indian communities (18 U.S.C. 1151)—terms not concerned with race as such but with the government's trust responsibility for the groups in question. Moreover, providing for federal and tribal jurisdiction where Indian interests are at issue is an important exercise of the federal trust responsibility for Indian tribes. See *United States* v. *Kagama,* 118 U.S. 375, in which the Court upheld the Major Crimes Act (18 U.S.C. 1153) against claims that punishment of Indians on Indian lands for criminal offenses was exclusively a state function.

The characterization by the court of appeals in this case of the historic allocation of state-federal jurisdiction as racial discrimination is also unfounded in that here, as in *Mancari, supra,* persons racially Indian do not necessarily come within the purview

of the statutes. For instance, a pure-blooded Indian who has severed his relationship with his tribe is not an Indian for purposes of federal Indian country jurisdiction. See, *e.g., United States ex rel. Standing Bear* v. *Crook,* 25 Fed. Cas. 695, No. 14891; *In re Carmen's Petition,* 165 F. Supp. 942, 944 (N.D. Cal.), affirmed, 270 F.2d 809 (C.A. 9), certiorari denied, 361 U.S. 934. Nor are members of Canadian or South American Indian tribes or of North American tribes terminated by Act of Congress Indians for purposes of federal criminal jurisdiction, although they are racially Indian. See *Morton* v. *Mancari, supra,* 417 U.S. at 553, n. 24; *United States* v. *Mazurie, supra,* 419 U.S. at 554, n. 11; *United States* v. *Heath,* 509 F.2d 16 (C.A. 9). With respect to those persons, as with the hypothetical non-Indian who provided the basis for comparison in the court below, federal Indian jurisdiction does not apply for reasons independent of race, *i.e.,* because there is no federal trust responsibility and thus no federal interest to be protected.[16]

C. THE PRINCIPLE ADOPTED BY THE COURT OF APPEALS, IF UPHELD, THREATENS TO INJECT UNCERTAINTY AND CONFUSION INTO THE PROSECUTION OF CRIMES OCCURRING IN INDIAN COUNTRY

In ruling that the prosecution of Indians for felony murder of a non-Indian is an unconstitutional racial

[16] The non-discriminatory reach of 18 U.S.C. 1152 and 1153 is also demonstrated by the concern the statutes give to the identity of the victim as well as the accused. The statutory scheme, as noted, applies to crimes by both Indians and non-Indians, provided at least that the victim is Indian. In recognizing no difference between Indian and non-Indian defendants where an Indian victim is involved, the scheme manifests its nondiscriminatory purpose to protect the welfare of the Indian tribe.

discrimination because the federal law governing the prosecution is harsher than the state law that would apply to the same offense were the state courts to have jurisdiction, the court of appeals has, we submit, erected grave barriers to the effective enforcement of laws governing criminal offenses committed in Indian country, whenever the victim of a crime is a non-Indian.[17] These consequences of the court of appeals' decision highlight the rationality of the historic allocation of state-federal jurisdiction that the court held to violate equal protection principles in this case.

1. In reversing respondents' murder convictions, the court of appeals did not address itself to the problem of what, if anything, was required or could be done to eliminate impermissible "discrimination" when trying offenses with non-Indian victims as to which there are, as in this case, material differences between state and federal law. We can imagine two possible outcomes: that such offenses may not be prosecuted at all until Congress either conforms federal law to state law or extends federal jurisdiction to all crimes in Indian country; or that the prosecution may proceed, but state law must be applied whenever or to the extent that it is more "lenient" than federal law. Since it seems to us virtually unthinkable that discrepancies between state and federal law should render the laws wholly unenforceable with respect to significant categories of serious crimes, we proceed on the assumption that the court's decision would require the incorpora-

[17] Any such consequence has serious ramifications because, as indicated above (see n. 10, *supra*, and accompanying text), a substantial proportion of the residents of many Indian reservations are non-Indians.

tion of the more lenient aspects of state law. While not wholly precluding enforcement of the laws, the requirement that the most lenient features of state and federal law be pieced together in cases of this sort introduces serious elements of uncertainty into law enforcement in Indian country.[18]

2. Prior to the decision of the court of appeals, any homicide, robbery, arson, larceny, or carnal knowledge of a juvenile in which an Indian was involved as accused or victim and which was committed in Indian country was defined and punished under clearly understood federal statutes—*i.e.*, general federal enclave laws applicable to all persons, regardless or race or status, within areas of exclusive federal jurisdiction. This has provided reasonable certainty in the law applicable to these major offenses.

The court of appeals has now required district judges in homicide cases in Indian country (and presumably in cases involving other offenses as well) to compare federal law to the state law in effect at the time and, if the state law is more lenient in any material respect, either to dismiss the prosecution (though the

[18] While we believe that circumstances may in particular instances justify a Congressional decision to treat Indians differently from non-Indians, we cannot accept the notion, implied at some points in the court of appeals' opinion, that any Congressional power to discriminate is limited to treating Indian defendants more leniently than their non-Indian counterparts. The concept of leniency cannot be equated with "the interest of the Indians." Law-abiding reservation Indians, like other law abiding citizens, have an interest in effective law enforcement as well as leniency. The complicated comparison in search of leniency seemingly required by the court of appeals is not, in our view, in the interest of the Indian tribes or their individual members.

crime cannot be prosecuted under state law) or apply a composite rule assuring the Indian defendant the benefits of the most lenient aspect of each body of law.[19] This comparative process leads into a morass, ending certainty as to the applicable law.

The instant problem, for example, arises because Idaho amended its first degree murder statute to remove the felony murder doctrine but to provide a mandatory death sentence. According to the reasoning of the court of appeals, the district court, rather than applying 18 U.S.C. 1111 as directed by 18 U.S.C. 1153, should have afforded the Indian defendant the benefit of the fact that Idaho law does not authorize a felony murder conviction. On the other hand, the district court presumably must reject other portions of the Idaho statute, specifically the mandatory death sentence. But this means that the district court is required to apply a patchwork of state-federal legal principles reflecting no coherent system—neither the laws enacted by Congress nor the framework selected by the state legislature.

Furthermore, the logic of the court of appeals' decision applies not only to the substantive definitions of the offense and the potential punishment upon conviction, but also to myriad procedural matters of potentially critical importance to the outcome of a trial. Differences in liberality of discovery, burden of proof on affirmative defenses, formulation of jury instructions, and similar matters between federal and state

[19] Several other crimes, either under the Assimilative Crimes Act, 18 U.S.C. 13, or under the second and third paragraphs of 18 U.S.C. 1153, are referred to state law for either definition or punishment. But see note 15, *supra*.

systems may give rise to "racial discriminations" equally deserving of the criticism leveled here against the application of federal felony murder principles. For example, if a State imposed upon the defendant the burden of establishing an insanity defense (*e.g., Leland* v. *Oregon,* 343 U.S. 790) but utilized a far more liberal version of the defense than is recognized in federal law, Indians seeking to raise such a defense in a federal prosecution would presumably have to be afforded the liberal state definition of insanity, while the burden of proof would remain on the prosecution under applicable federal principles.

The opportunities for confusion and dispute created by the court of appeals' decision thus appear virtually limitless. Moreover, it will often be impossible for a judge to determine whether the state or the federal statute is more "lenient". For instance, the federal manslaughter statute, 18 U.S.C. 1112, provides only two categories of manslaughter, voluntary and involuntary, and provides imprisonment of not more than ten years for the former and not more than three years and a fine of $1,000 for the latter. The Idaho statutes (§§ 18–4006, 18–4007 (1975 Cum. Supp.)) provide four categories of manslaughter and penalties varying by category, some greater, some less than under the federal statute. An attempt to collate these statutes leads to nothing but confusion.

While many other like examples could be adduced, we think it plain from the foregoing that the superimposition of the court of appeals' equal protection analysis upon the historic state-federal division of jurisdiction over offenses committed in Indian country has, to say the least, unfortunate consequences for

rational law enforcement in the area. Of course, if the court of appeals' analysis is correct, the unconstitutional consequences of the historic system cannot be countenanced, regardless of adverse practical impact. As a practical matter, Congress would be forced to make an almost impossible choice. It could assert exclusive federal jurisdiction over all offenses occurring in Indian country, thereby increasing federal responsibility beyond the needs of its trusteeship. Alternatively, it could provide that all such offenses be governed by state law under an assimilative crimes principle (at least as to crimes with non-Indian victims) thereby renouncing its discretion in exercising its trusteeship, and, in effect, relinquishing the supremacy of federal law in a field of federal responsibility. The rationality and constitutional validity of the historic system of allocation of jurisdiction is, we suggest, illuminated by the unfortunate consequences of the court of appeals' result.

3. Additionally, we observe that the decision below, although cast in terms of assuring that Indian defendants are not subjected to any features of federal law that are more "harsh" than applicable state law, also has consequences for state trials of non-Indians charged with offenses in Indian country, which come within the historically recognized jurisdiction of the state courts. If the court of appeals is correct in holding that respondents' conviction of felony murder constitutes impermissible racial discrimination between Indians and non-Indians, we have considerable difficulty avoiding the conclusion that non-Indians subjected to provisions of Idaho law that are harsher

than corresponding federal provisions for offenses on the Coeur D'Alene reservation would also be victims of racial discrimination. For example, the murder of a peace officer acting in the line of duty could not constitutionally be tried as first degree murder in the Idaho courts without proof of premeditation, as Idaho Code § 18–4001 provides, because the federal provision that would govern the trial of an Indian for the same offense, 18 U.S.C. 1111, contains no similar provision. In other words, whenever the special federal wardship interests respecting tribal Indians are insufficient to justify a result that treats Indians less favorably than non-Indians, it is hard rationally to justify treating non-Indians less favorably than similarly circumstanced Indians. Thus, if the court of appeals is correct here, it seems likely that the Equal Protection Clause of the Fourteenth Amendment correspondingly obliges state courts to import any more lenient features of federal law into trials of non-Indians for offenses committed in Indian country.

II.

IF THIS COURT ACCEPTS THE RATIONALE OF THE COURT OF APPEALS, IT SHOULD CONSTRUE 18 U.S.C. 1152 (AS IT LITERALLY READS) TO ENCOMPASS ALL OFFENSES COMMITTED IN INDIAN COUNTRY

1. On its face, the first paragraph of 18 U.S.C. 1152 requires the application of general federal enclave law to all offenses committed in Indian country, regardless of the identity of the accused (the second paragraph reserves tribal jurisdiction over offenses committed by Indians but creates no exception for non-Indian defendants). As we have seen, this Court,

sensitive to the respective areas of interest of the States and of the United States, has construed the predecessors of Section 1152 as not providing federal jurisdiction over crimes solely involving non-Indians although occurring within Indian reservations.

It is a well recognized principle of statutory construction that the Court should adopt that interpretation of a challenged statute that will preserve its constitutionality, wherever the language and history of the statute admit of such an interpretation. See *Screws* v. *United States,* 325 U.S. 91, 98; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30; *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (Brandeis, J., concurring). Accordingly, if this Court agrees with the court of appeals that the division of jurisdiction heretofore approved by decisions of this Court leads to unconstitutional results nullifying various provisions of Section 1153 when the latter conflict with state law, it becomes necessary to reconsider the interpretation of Section 1152's predecessors adopted in *McBratney* and *Draper.* The equal protection problems can be obviated by construing Section 1152 to vest exclusive jurisdiction in the federal courts over all offenses occurring in Indian country, regardless of the identity of accused or victim, thereby causing all cases to be governed by federal law.[29]

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[29] In view of the fact that Section 1152 is, on its face, concerned with directing that federal law governs the prosecutions within its reach rather than with the question of which courts have jurisdiction to try the cases, it might be possible to construe the provision as leaving jurisdiction in state courts but requiring them to apply federal substantive law. From a prac-

Were the Court to adopt this construction and, in effect, overrule *McBratney, Draper,* and their progeny, it would follow that respondents' equal protection attack on the statute must fail, since the hypothetical non-Indian defendant could not avoid exposure to a felony murder conviction through recourse to more "lenient" state law.

We do not mean by the foregoing to suggest that, as a legislative matter, recognition of exclusive federal jurisdiction over crimes in Indian country, regardless of Indian involvement in the particular transaction, is a wise course. Such a course would entail a considerable expansion of federal jurisdiction with respect to a class of cases in which it might reasonably be concluded that federal regulatory interests are subordinate to those of the States. Moreover, in view of the large non-Indian population in many reservations, it might substantially expand the workload of the federal district courts in some of the western States. On the other hand, such a course could well be judged preferable to the uncertanties caused by the impact of the

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tical standpoint, this seems a quite unsatisfactory approach. Moreover, it is probably inconsistent with 18 U.S.C. 3231, which vests exclusive jurisdiction in the federal district courts to try "all offenses against the laws of the United States," since the reinterpretation of Section 1152 discussed in text would appear necessarily to transform criminal acts by non-Indians in Indian country that have previously been tried by the States into offenses against the United States.

The August 15, 1975 Committee Print of S. 1, 94th Congress, 1st Session, the proposed Federal Criminal Code would extend concurrent Federal criminal jurisdiction to crimes between non-Indians within Indian country. See Sections 203; 205; 685(c). If the court of appeal's reasoning is accepted, it seems doubtful that this would eliminate the equal protection problem.

decision of the court of appeals upon the present jurisdictional allocation (see pp. 36–42, *supra*); and it would have the virtue of fostering the intent of Congress to have the crime of murder (and other major crimes) occurring on Indian reservations tried in accordance with uniform and well understood federal law.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-661

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR GABRIEL FRANCIS ANTELOPE, ET AL.

QUESTIONS PRESENTED

1. Does 18 U.S.C. 1153 classify Indians on the quantum of Indian blood or race, without regard to tribal enrollment, thereby demanding the closest of judicial inspection to withstand constitutional due process requirements?

2. If the above question is answered in the affirmative, has the government proven more

than a rational basis for the discriminatory classification, and, in fact, met the more rigorous "compelling interest" test in order to sustain the racial classification?

3. If the first question is answered in the negative, has the application of 18 U.S.C. 1153 in the case at the bar been so invidiously discriminatory as to be in violation of the Fifth Amendment?

4. Whether 18 U.S.C. 1153 is so vague on its face and in its application that it lacks constitutional certainty as to whom the statute will bring under its provisions for cirminal jurisdiction?

SUMMARY OF ARGUMENT

I.

There is no question, either directly from the face of 18 U.S.C. 1153, or by the various federal and state court interpretations of 18 U.S.C. 1153, but that the term, "Indian" is a racial classification. The clear majority of the lower federal appellate courts that have discussed the statute all agree that it classifies by race or quantum of blood. This Court has never disagreed, but has only continued that interpretation.

Only people who have the requisite percentage of Indian blood can be reached by the criminal jurisdiction of the federal government under

18 U.S.C. 1153. Once a person is born an Indian and lives on the reservation for any reasonable time, it is very difficult, if not impossible, for him to emancipate himself, of his own free will, from that status.

There is no rational governmental interest which will support this racial classification for criminal jurisdiction. However, a rational test is not sufficient for this highly suspect classification. At a minimum, the government is required to present some compelling federal necessity for the classification. None has been offered. Neither the wardship doctrine, nor the plenary powers doctrine meet the burden.

In the case at the bar, 18 U.S.C. 1153 was applied in an invidiously discriminatory manner. It subjected the Respondent to a first degree murder conviction solely on the basis of his race. No other non-Indian, in his position, could have been engulfed by the criminal jurisdiction of 18 U.S.C. 1153.

Congress has the responsibility of writing the laws as it is the representative of the people. However, Congress must be definite and precise in the language so that all citizens may be put on notice of any prohibited conduct. Even more important than the notice requirement, the language must be of sufficient clarity that it is administered in an evenhanded manner to

insure equality and justice for all. The essential terms of a law must be certain.

The term, "Indian" in 18 U.S.C. 1153 is not defined. The administrative discretion which is allowed by this oversight makes the law fit the whim of the administrator, not the will of the people. Vagueness reaches beyond the present fact situation. The vagueness in 18 U.S.C. 1153 violates the Due Process Clause of the Fifth Amendment and requires the Court to strike the statute and allow the Congress to remedy the infirmity.

The lower court's decision must be affirmed.

ARGUMENT

I.

18 U.S.C. 1153 CLASSIFIES INDIANS BY QUANTUM OF BLOOD AND RACE, THEREBY CREATING A SUSPECT CLASSIFICATION DEMANDING STRICT JUDICIAL SCRUTINY.

The essential question presented by this case is whether criminal jurisdiction over Indians is acquired through a statute based on racial classification. The statute rendering jurisdiction over Indians in criminal matters uses racial language on its face. "Any Indian who commits against the person or property of another Indian . . . (18 U.S.C. 1153) (Emphasis supplied.)

Although the statute does define the other requirement for criminal jurisdiction, i.e. Indian country, (18 U.S.C. 1151) it does not define the term, "Indian". The earliest definition of that term by this Court was by United States v. Rogers, 45 U.S. 567 (1846). There the defendant, a white man, had lived on the reservation of the Cherokee tribe for nearly ten years, had married an Indian, had several children, was adopted by the tribe under proper authority and exercised all rights and privileges of a Cherokee Indian. However, the Court refused to allow him to be defined as an Indian for the purposes of criminal jurisdiction.

". . . we think it very clear, that a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian. . . . He may by such adoption become entitled to certain privileges in the tribe. . . . Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe; but of the race generally, --of the family of Indians. . . * * * Whatever obligations the prisoner may have taken upon himself by becoming a

Cherokee by adoption, ... <u>He was still a white man, of the white race</u>. . . ." <u>United States v. Rogers</u>, <u>supra</u>, at 572-573. (Emphasis added.)

In a later case this Court refused to allow a black to be adopted into an Indian tribe for criminal jurisdiction purposes.

> "Although the prisoner, Alberty, was not a native Indian, but a negro born in slavery, <u>it was not disputed that he became a citizen of the Cherokee nation</u>. . . * * * While this article of the treaty gave him the rights of a native Cherokee, <u>it did not</u> . . . <u>make him an Indian</u>, within the meaning of Rev. St. Section 2146. . . ." <u>Alberty v. United States</u>, 162 U.S. 499, 500, 501 (1896). (Emphasis supplied.)

In still a later case, this Court was faced with a determination of how to determine which persons would fall into the guardianship category for protection. It continued the racial definition for the term, "Indian". "Congress has recognized that un-enrolled Creeks of the <u>half-blood or more are tribal Indians</u> subject to federal control." <u>Board of Commissioner v. Seber</u>, 318 U.S. 705, 718 (1942). (Emphasis supplied.)

Felix S. Cohen in his much quoted book on

Indian Law, <u>Handbook of Federal Indian Law</u>, (1942 ed.) at 3, has agreed with the Court's interpretation and has furthered the racial, or per quantum of blood requirement in defining the term, "Indian".

> ". . . the term 'Indian' is one descriptive of an <u>individual who has Indian blood in his veins</u> and who is regarded as an Indian by the society of Indians among whom he lives. Thus, in holding that a white man who is adopted into an Indian tribe does not thereby become an Indian within the meaning of the foregoing statute. . . ." (Indication is that the foregoing statute referred to is 18 U.S.C. 1153.) (Emphasis supplied.)

The Association on American Indian Affairs' book, <u>Federal Indian Law</u>, (1966) at 8, which is a later manual used by the Interior Department and its office for Indian Affairs has clung to the requisite of Indian blood.

> "Within the meaning of those various statutes which though applicable to Indians do not define them, the courts, in defining the status of Indians of mixed Indian and other blood, have largely followed the test laid down in <u>United States v. Rogers</u>, to the

effect that an individual to be considered an Indian must not only have some degree of Indian blood but must in addition be recognized as an Indian." (Emphasis supplied.)

The major legal encyclopedias have defined Indians for criminal jurisdiction under 18 U.S.C. 1153 in accord with the requirement of racial characteristics and a certain quantum of Indian blood.

42 C.J.S. Section 10(c) at 664 - "A tribe of Indians may admit aliens to membership in the tribe, and a person so adopted acquires all the rights and incurs all the obligations of a member of the tribe. He does not however, . . . become an 'Indian' within the meaning of the statutes." (Emphasis supplied.)

41 Am. Jur. 2d Section 1 at 833 - "The term 'Indians,' as ordinarily used when referring to persons in the United States, is understood to refer to the members of that race of men who inhabited North America when it was discovered by Caucasians; it describes a person of Indian blood, and a white man or a negro who is adopted into an Indian tribe does not become an Indian."

Both the lower federal courts and the state supreme courts have interpreted 18 U.S.C. 1153 in exactly the same manner as previously explained.

In Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (1965), the federal court used this language for the establishment of the meaning of the term, "Indian".

". . . it seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood."

Later in the opinion the court explained more fully its meaning.

"It is plain the Congress . . . has deemed it expedient, and within its power, to classify Indians according to their percentages of Indian blood. * * * Indians can only be defined by their race." Id. at 814.

The Arizona State Supreme Court has employed the same definition as late as 1975, in State v. Atteberry, 110 Ariz. 354, 519 P2d 53,54 (1974). To determine whether the defendant came within the purview of 18 U.S.C. 1153 as an Indian, the court followed this test:

". . . the test of Indian status has

depended primarily on two things (a) a substantial percentage of Indian blood, and (b) recognition as an Indian."

The impact of these earlier United States Supreme Court cases and the number of federal cases using the racial classification rule of definition allowed the Court in Kills Crow v. United States, 451 F2d 323, 325 (1971), to dispose of the question of racial classification by 18 U.S.C. 1153 laconically in these words:

". . . it hardly needs to be observed that section 1153 is founded upon a racial classification. . . ."

This conclusion is reached by two approaches. First, it is impossible for non-Indians to be classified as Indians for purposes of 18 U.S.C. 1153. Secondly, it is not always possible for Indians to disenfranchise themselves from this racial category. This is especially true of the person who is a full-blooded Indian with all the normal physical characteristics of the race and has either been born on the reservation or resided on a reservation for any length of time. Non-Indians may be adopted for several burdens and privileges of the tribe in various contexts, but never to be subjected to criminal jurisdiction under 18 U.S.C. 1153. Only those people who could biologically be classified as Indians

can receive the sweeping effect of 18 U.S.C. 1153.

The Appellants suggest that the term "Indian" is nothing more than a political division, or "social-political group". They contend that, although one of non-Indian ancestry may not be able to become an Indian, an Indian can emancipate himself from the tribe and therefore escape the criminal jurisdiction of 18 U.S.C. 1153. The suggested procedure is by removal of one's name from the tribal enrollment records.

This is not always the case. A complete and detailed examination of both the lower federal and the appellate court decisions will readily reveal that seldom has a person with racial characteristics of an Indian not been held under federal criminal jurisdiction. Some courts have even denied that tribal enrollment should be considered. Felix S. Cohen suggested that not only was tribal enrollment indeterminative, but supervision of an Indian agent and citizenship were equally indeterminative.

"On the other hand, an Indian does not lose his identity as such within the meaning of federal criminal jurisdiction acts, even though he has received an allotment of land, is not under the control or immediate supervision of an Indian agent, and

has become a citizen of the United States and of the state in which he resides." Cohen, Handbook of Federal Indian Law, (1942 ed.) at 3.

In Ex Parte Pero, 99 F2d 28, 31 (1938), the court concluded that the child of an Indian full-blood mother, and a one-half blood Indian father was an Indian, eventhough he was not enrolled in any tribe. The test expressed by the court consisted of these three ingredients: (1) preponderance of blood, (2) habits of the person, and (3) substantial amount of Indian blood plus a racial status in fact as an Indian.

This decision was followed only recently in 1974 by the federal court in United States v. Ives,[1] 504 F2d 935. The defendant was convicted of murdering a non-Indian on an Indian reservation thereby coming under 18 U.S.C. 1153. He was identified as an Indian, eventhough he had voluntarily and on his own initiative tried to have his name removed from the tribal rolls a considerable time before the commission of the

[1]Ives v. United States was granted certiorari (421 U.S. 944), the judgment was vacated and remanded for consideration of the psychiatric examination issue of defendant's competency to stand trial as explained by the court in Drope v. Missouri, 95 S. Ct. 896.

homocide. The court held nevertheless, that: ". . . enrollment or lack of enrollment is not determinative of Ives' status as an Indian." Ives v. United States, supra, at 953.

In In Re Carmen's Petition, 165 F. Supp. 942 (1958) aff'd per curiam sub nom; Dickson v. Carmen, 270 F2d 809 (1959) cert. denied, the defendant had been convicted for the murder of an Indian within Indian country, bringing into play 18 U.S.C. 1153 and 18 U.S.C. 1111. The court refused to accept the negation of tribal relations as bearing on the status of the defendant being an Indian or not.

"Respondent also questions the applicability of the Major Crimes Act on the grounds that petitioner although an Indian by blood, is emancipated to such an extent that he is not an Indian within the meaning of the Act. None of the decisions relied upon by respondent support this contention." In Re Carmen's Petition, supra, at 946.

The court did not consider whether an Indian can be emancipated so as to escape the Act. Instead, it cited Davis v. United States, 32 F2d 860 (1929) as standing: "For the proposition that tribal relations have no bearing on an Indian's status as an Indian within the meaning of the Ten Major Crimes Act." In Re Carmen's Petition, supra, 947.

There can be little question that 18 U.S.C. 1153 is a racial classification in using the term, "Indian". Tribal enrollment is not used by all courts to determine if the accused is either in or out of the so-called "social-political group" and tribal enrollment is most certainly not determinative of his racial status as an Indian. It should be pointed out that determination of who is enrolled on the tribal rolls is within the discretion of the Department of the Interior and its offices. The guidelines for such enrollment by those offices are also on a quantum of blood analysis.

"The Indian tribes have original power to determine their own membership. Congress has the power, however, to supersede that determination. . . * * * Congress may authorize an administrative body to make a roll descriptive of the persons thereon so that they might be identified. . . * * * Congress may disregard the existing membership rolls of a tribe and direct that the per capita distribution be made upon the basis of a new roll, even though such act may be inconsistent with prior legislation, treaties, or agreements with the tribe. (See also 25 U.S.C. 163) Cohen's Handbook on Federal Indian Law, supra, at 98-99.

It is for the above described reasons that the lower court in the case at the bar said: "We here emphasize that the sole basis for the disparate treatment of appellants and non-Indians is that of race." (Pet. App. 6a) It is because of this racial classification for criminal jurisdiction by 18 U.S.C. 1153 that this Court must carefully scrutinize in the strictest of manners, the statute in question.

II.

THE RACIAL CLASSIFICATION OF 18 U.S.C. 1153 RESULTS IN INVIDIOUS DISCRIMINATION AND CAN STAND CONSTITUTIONAL MUSTER ONLY IF A COMPELLING FEDERAL INTEREST IS SHOWN BY THE GOVERNMENT WHICH NECESSITATES THIS RACIAL CLASSIFICATION.

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is violative of due process. Jimenez v. Weinberger, 417 U.S. 628 (1974); Johnson v. Robison, 415 U.S. 361 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954).

The Court in Bolling v. Sharpe, supra, held that the Fifth Amendment applies to the federal government much like the Fourteenth does to the states.

"Classification based solely upon race must be scrutinized with particular

care, since they are contrary to our traditions, and hence constitutionally suspect. As long ago as 1896, this Court declared the principle, 'that the Constitution of the United States, in its present form, forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race.'"
Bolling v. Sharpe, supra, at 499.

When a racial classification is seen as being unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it will also be seen as unconstitutional under the due process requirement of the Fifth Amendment. To allow a racial classification statute to stand, the government must show some compelling interest in the classification.

This Court in Hunter v. Erickson, 393 U.S. 385, 392 (1969) explained that:

". . . racial classifications are constitutionally suspect and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications."

The point of the case and the language was that more than the traditional reasonable relationship test would be needed for these, the most abhorent of classifications. The suspect

criteria has applied not only to race but to alienage, national origin, and religion as well.

This Court has noted that the "traditional indicia of suspectness" are: (1) a class determined by characteristics which are solely an accident of birth; or (2) a class subjected to such a history of purposefully unequal treatment or relegated to a position of such political powerlessness, as to command extraordinary protection from the majority. Johnson v. Robison, 415 U.S. 361 (1973). The present classification fits both categories: the class is determined by accident of birth, and the class has been subjected to a history of unequal treatment resulting in political powerlessness.

Justice Harlan in Hunter v. Erickson, supra, at 393, described what might be necessary to sustain the required heavy burden of justification. "Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind."

When the racial classification by statute is concerning a criminal statute, i.e. rendering criminal jurisdiction over a person, then the burden of sustaining it is even greater, and possibly incapable of being met. Justice Stewart in McLaughlin v. Florida, 379 U.S. 184, 198 (1964) explained it in this fashion:

"It is simply not possible for a state law /or in this case a federal law/ to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."

Again it should be noted that the court of appeals found:

"That the sole basis for the disparate treatment of appellants and non-Indians is that of race." (Pet. App. 6a)

Although the criminality of the act per se is not based on race, i.e. 18 U.S.C. 1111 is not racial in classification, the jurisdictional power which brings the defendant under 18 U.S.C. 1111 is based on race, thereby creating an identical result as in McLaughlin, supra.

Appellants argue that the compelling federal interest for this racial classification is two-fold: (1) the plenary power of Congress over Indians, and (2) the government's trust responsibility for the Indians.

Congress has plenary power over Indians and a wide-scope of authority over their affairs. However, Congress in exercising its many powers over Indian and Indian affairs is subject to all the limitations contained in the Bill of Rights. In 1938 this Court, after noting the plenary power of Congress in this area added:

"It is appropriate first to observe

that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to Constitutional limitations. . . ." United States v. Klamath & Moada Tribes of Indians, 304 U.S. 119, 123 (1938).

Eight years later, Chief Justice Vinson speaking for the Court said:

"The power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946).

When Congress acts in this area as elsewhere, those congressional acts which use racial classification are judicially suspect and must show some compelling federal interest to allow the classification, or be found unconstitutional.

Professor Norman Vieira in his often quoted article from the Michigan Law Review, 67:1553, "Racial Imbalance, Black Separatism, and Permissible Classification by Race", (1969), points out the origin of Congress' power over Indians. Article 1, Section 8, clause 3 of the United States Constitution, "to regulate Commerce . . . with the Indian Tribes." He goes on to explain that this power is not boundless.

"This use of racial criteria cannot be explained and, hence, limited by the

constitutional grants of power to regulate Indian affairs. Consideration of race has not been confined to implementing treaties with Indian nations, ... Although federal control over United States possessions and over commerce with Indian tribes permits extensive regulation, this federal power should no more authorize racial distinctions than does the corresponding state power to regulate local commerce and local property." Mich. L. Rev. 67:1553, supra.

The trust responsibility must remain subject to constitutional limitations in recognition of Indians' inherent rights as citizens of the United States. This Court confirmed th't position in Keeble v. United States, 412 U.S. 205, 211, 212 (1973).

> "In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under /federal criminal/ laws and taught to regard life and the personal property of others.' 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). This is emphatically not to say, however, that Congress intended

> to deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant." (Emphasis supplied.)

It was on this same basic reasoning that the Federal District Court of New Mexico in United States v. Boone, 347 F. Supp. 1031 (1972) held 18 U.S.C. 1153 to be a denial of equal protection: ". . . the defendant is subject to conviction upon a lesser burden of proof. . . ."

The Court went on to find:

> "In the case at bar, the racial differentiation in section 1153 results in disadvantages to the defendant and it is difficult to see any benefit to Indians generally. The racial classification is not reasonably related to any proper governmental objectives and is therefore arbitrary and invidious in violation of the due process clause of the Fifth Amendment." United States v. Boone, supra, at 1035.

The facts of the case at bar result in an identical conclusion. Mr. Antelope was subjected, because of the racial classification, to a very serious disadvantage in defending himself.

The federal murder statute, 18 U.S.C. 1111, made applicable to Indians by 18 U.S.C. 1153, contains what is commonly known as the felony

murder rule. Mr. Antelope was convicted of murder in the first degree under this felony murder rule.

The felony murder rule had its origin and rationale in past times when all felonies were punishable by death, therefore, it mattered little whether the felon was executed for the underlying felony or the taking of a human life. See, LaFave and Scott, Criminal Law, 545-561 (West 1972). It cannot be disputed that the doctrine has been in disfavor for decades and has been limited or abolished in many jurisdictions.

The practical result of the application of the felony murder rule in the present case was that the Government did not have to prove beyond a reasonable doubt that the killing was "willful, deliberate, and premeditated." The jury instructions merely incorporated the robbery charge in Count II along with the "intentional, unintentional, or accidental" killing of a human being while perpetrating a robbery.

Idaho repealed its felony murder statute in 1973. Idaho Session Laws, 1973, Ch. 276, Sec. 1, 588. To be convicted of first degree murder under the Idaho Code, the prosecution must prove beyond a reasonable doubt that the killing was "willful, deliberate, and premeditated." Idaho Code 18-4003.

It is obvious that the burden of proof under the federal definition of first degree murder is much less onerous than under the Idaho Code. The Government, in the present case, did not need to prove, nor did they prove, that the killing of Mrs. Emma Johnson was "willful, deliberate, and premeditated" under 18 U.S.C. 1111. In addition, because of the felony murder instructions, the Government was not required to prove, and did not prove, that Mr. Antelope actually caused the death of Mrs. Emma Johnson. What guardian or trustee would subject its beneficiaries to such harsh judgments?

The idea of the wardship doctrine developed from dicta of Chief Justice Marshall's opinion in Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The Cherokee Nation had attempted to invoke the Court's original jurisdiction over controversies, "between a State . . . and foreign States." (United States Constitution, Article III, Section 2) The Indians' contention was rejected and they were characterized as a "domestic dependent nation," instead. The dicta creating the wardship doctrine stated: "/The Indians/ are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." Cherokee Nation v. Georgia, supra.

In United States v. Kagama, 118 U.S. 375 (1886) the Court drew from Marshall's dictum to extend the wardship concept to allow Congress

virtually plenary power over the Indians.

This antiquated doctrine and the racial imputs from congressional acts and early court decisions can be illustrated with the language from these few cases.

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection. . . ." United States v. Thomas, 151 U.S. 577, 585 (1893).

In United States ex rel. Standing Bear v. Crook, 25 Fed. Cas. 695, No. 14891 (1879), the court had to resort to a Webster dictionary to determine if an Indian was a person so as to employ a writ of habeas corpus.

> "Webster describes a person as a 'living soul, a self-conscious being; a moral agent; especially a living human being; a man, a woman or child; an individual of the human race.' This is comprehensible enough, . . . to include even an Indian."

The motives of Congress can be seen in the Congressional Record during the passage of the 1909 Amendment to 18 U.S.C. 1153, which limited the death penalty exclusion to those who raped Indian women in Indian country. "The morals of Indian women are not always as high as those of white women and consequently the punishment should be lighter for an offense against her." (43 Cong. Rec. 2595-96) (1909).

Although the Court has repeated several times that they would not examine the wardship doctrine in these changing times, (See, Board of County Commissioners v. Seber, 318 U.S. 705 (1943); Re Heff, 197 U.S. 488 (1905) and has patiently waited in vain for Congress to act, surely it will not allow that superannuated purpose of wardship in and of itself to be the compelling test which allows an Indian to be convicted of first degree murder more easily than a non-Indian.

> One commentator has put it this way: "It is hard to imagine arguments which would validate such discrimination against Indians. Certainly, the status of wardship is not sufficient by itself." See, "Indictment Under the 'Major Crimes Act' - An Exercise in Unfairness and Unconstitutionality", 10 Ariz. L. Rev. 691 (1968).

The Eighth Circuit in United States v. Big Crow, 523 F2d 955, 959 (1975) cert. denied, explained it in this manner.

> "While the Supreme Court has approved legislation singling out Indians for special treatment, such special treatment must at least be 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . .' It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection. We further question whether the rational basis test is the appropriate standard where racial classifications are used to impose burdens on a minority group rather than, as in Morton v. Marcari, 417 U.S. 535 (1974), to help the group overcome traditional legal and economic obstacles. It is the generally settled rule that the government bears the burden of showing a compelling interest necessitating racially discriminatory treatment. * * * Under the circumstances, we are constrained to hold that 18 U.S.C. 1153 can not constitutionally be applied so as to subject an Indian

> to a greater sentence than a non-Indian could receive for the same offense."

If this wardship position is a protected status, it is a peculiar one in light of the additional jeopardy in which it placed Mr. Antelope. He has been placed at a distinct and serious disadvantage solely because of the fact that he is an Indian. Had he been non-Indian, he would not have been tried in the United States District Court. New York ex rel. Ray v. Martin, 326 U.S. 496; United States v. McBratney, 104 U.S. 621. Had Mr. Antelope been non-Indian he would not have been subject to the felony murder rule. Had Mr. Antelope been non-Indian, the Government would have had to prove that his actions were the actual cause of death, and that such killing was "willful, deliberate and premeditated" in order to have convicted him of first degree murder.

In United States v. Cleveland, 503 F2d 1067, 1071 (1974), the Ninth Circuit in an 18 U.S.C. 1153 case held that:

> "The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none."

The same conclusion was reached in United States v. Boone, 347 F. Supp. 1031, 1035 (1972).

> "Moreover, the government has offered no justification for the provision other than a general reference to Congress' plenary power over Indians. Hopefully, that power does not allow Congress to make arbitrary distinctions, particularly in the area of criminal law."

The Indians protected status cannot be employed to make their prosecution for murder in the first degree easier than that of non-Indians under identical circumstances, either under the plenary power or the wardship doctrines.

The purpose of the various acts under the Ten Major Crimes Act was to bring Indians under federal jurisdiction to permit the prosecution of Indians in the same manner as all other people:

> ". . . shall be subject to the same laws and penalties as all other people committing any of the above offenses." (18 U.S.C. 1153)

It cannot now be used to discriminate against Indians.

Indians' rights to due process and equal protection require a more even-handed approach. The racial classification of 18 U.S.C. 1153 requires a compelling federal interest. Since not even a rational interest has been shown,

the classification must be seen as invidiously discriminatory and therefore, unconstitutional.

It needs to be noted at this point that there has been no disagreement among the various appellate federal decisions as to the issue of racial classification in 18 U.S.C. 1153. United States v. Cleveland, supra; United States v. Analla, 490 F2d 1204 (1974); United States v. Boone, supra; Henry v. United States, 432 F. Supp. 1031 (1972); Gray v. United States, 394 F2d 96 (1967); Kills Crow v. United States, supra; United States v. Maestas, 523 F2d 316 (1975); United States v. Big Crow, 523 F2d 955 (1975).

As was pointed out in United States v. Boone, supra, at 1035:

> "Other federal appellate cases considering equal protection attacks on section 1153 have sustained the statute either because the distinction challenged was beneficial to Indians generally, Gray v. United States, 394 F2d 96, or because the defendant in the case suffered no disadvantage as a result of the distinction involved."

Or as was pointed out in United States v. Analla, supra, the difference in wording between the federal statute and the comparable state statute was only a difference in nomenclature, and not substantive law, with the same elements required in both, with the same burden of proof.

The disparity between Idaho Code 18-4003 and 18 U.S.C. 1111 is much more than nomenclature. Mr. Antelope suffered serious disadvantages.

This Court expressed it most clearly in McLaughlin v. Florida, supra, at 192, that where the statute uses racial classification it is suspect and must meet the compelling interest test, and, "Without such justification the racial classification . . . is reduced to an invidious discrimination."

III.

EVEN CONSIDERING 18 U.S.C. 1153 TO BE CONSTITUTIONAL, THAT THE RACIAL CLASSIFICATION COMPELLING INTEREST TEST IS MET, THE APPLICATION OF 18 U.S.C. 1153 IN THE CASE AT THE BAR IS INVIDIOUSLY DISCRIMINATORY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

This Court early in 1886 in Yick Wo v. Hopkins, 118 U.S. 356, 373, held that application of constitutional laws in a discriminatory manner was a denial of equal protection and due process under the Constitution.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority . . . so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

18 U.S.C. 1153, if it is seen to meet the compelling interest test, may be held constitutional on its face. However, in the facts before this Court it is quite obvious that the Respondent is being treated in a discriminatory manner.

This Court has continuously held that the laws of the state have jurisdiction over criminal offenses committed on Indian reservations by non-Indians. New York ex rel. Ray v. Martin, 326 U.S. 496; Draper v. United States, 164 U.S. 240; United States v. McBratney, 104 U.S. 621; Williams v. United States, 327 U.S. 711. The language from Williams, supra, at 714, typifies the holdings: ". . . the laws and courts of the State of Arizona . . . have jurisdiction over offenses committed on this reservation between persons who are not Indians. . . ."

The victim of the homocide in question was a non-Indian. Had Mr. Antelope also been a non-Indian, there would be little question but that Idaho substantive law would apply and not 18 U.S.C. 1111. The difference is not due to geographical location. The location in either the

case at the bar or the hypothetical case with the non-Indian assailant would fall within the definition of "Indian Country" as expressed in 18 U.S.C. 1151. The result in this case is not the same as normally happens in federal enclave cases. The normal rule is geographical; the rule in the present case is purely racial. The application of 18 U.S.C. 1153 and correspondingly 18 U.S.C. 1111, the murder felony rule would apply only to Indians who found themselves in exactly the same position as Mr. Antelope; never to non-Indians.

It was in Hunter v. Erickson, 393 U.S. 385, 391 (1969) that this Court said:

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."

The statute, as applied, was held unconstitutional. This case requires the same result.

This precise problem was cited most recently in a lower federal court decision: United States v. Tyndall, 400 F. Supp. 949 (1975). The court dismissed an indictment for assault with intent to inflict great bodily injury as not being within the Major Crimes Act. In footnote 6, it stated a real concern over the constitutionality of 1153 in application: "The Court also has serious reservations as to whether

the Major Crimes Act can withstand a 'denial of equal protection as applied' attack . . . ."

This serious reservation must be resolved by this Court now. The resolution is that 18 U.S.C. 1153, as applied, denied Mr. Antelope the equal protection of the land and his rights to due process as guaranteed under the United States Constitution solely on a racial basis.

IV.

IN THE ALTERNATIVE, 18 U.S.C. 1153 IS UNCONSTITUTIONALLY VAGUE IN THE ADMINISTRATIVE DISCRETION ALLOWED AS TO THE DEFINITION OF THE TERM "INDIAN."

The lower appellate court disapproved of allowing the government to circumbent discriminatory laws by accomplishing through discriminatory jurisdiction what it could not do through discriminatory statutory coverage.

> "The government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage . . . . To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity, employing jurisdiction as an inviolate tool. (Pet. App. 12a).

There is nowhere in Chapter 53 of Title 18 of the United States Code a definition of the term, "Indian". The Code is careful to include a detailed description of "Indian Country" (18 U.S.C. 1151), which definition has not avoided several legal interpretative court actions. Mattz v. Arnett, 412 U.S. 481 (1973); United States v. Chavez, 290 U.S. 357 (1933).

The failure by the Congress to define the term "Indian" causes ever great constitutional problems of certainty. It must be noted at this point that 18 U.S.C. 1111 is not being challenged on the vagueness charge; only 18 U.S.C. 1153 is being challenged.

Justice Douglas in United States v. Cardiff, 344 U.S. 174 (1952) explained the vice of vagueness as it related to the lack of identification of the person to whom a criminal statute, or in this case criminal jurisdiction, would apply:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula. (Emphasis added.)

Not only must criminal activity be defined with definiteness and certainty, but criminal jurisdiction must inevitably fit the same standard.

This is not only a common-law requirement but is now regarded as an element of due process. The underlying principle is that people are entitled to be informed not only as to what the state or federal government forbids, but also as to whom the law applies.

An example of the confusion which can arise is typified in United States v. Red Wolf, 172 F. Supp. 168, 172 (1959). In this case the defendants were 18 and 19 year old boys who were charged with the rape of consenting 17 year old Indian girl on an Indian reservation. Under Montana law any sexual intercourse with a female, not the wife of the perpetrator, under the age of 18 was rape. However, under 18 U.S.C. 2032 the age was set at 16. The entire question of criminal conduct was based on whether or not the defendants were to be charged under federal or state jurisdiction.

The participants were not on notice of any violation of the law, and were unable to determine which law would apply. The boys could not determine whether the girl would be recognized as an "Indian" by the prosecutors and therefore determine whether the act would be unlawful.

Fortunately the court dismissed the charge, for as it held a contrary holding would have required that: "An Indian would be held to a greater degree of responsibility than a white man. * * * It is extremely unlikely that Congress

intended such a discriminatory result."

A statute must not be so vague as to allow the prosecutors, police, or courts the power to determine the law for themselves. The due process clause demands that criminal statutes and criminal jurisdictional statutes be established by elected representatives and applied uniformly to all suspects; standards which are so vague that they may change from one case to the next allows prosecutors to take the law into their own hands and are more nearly individual whims than statutes.

18 U.S.C. 1153 is such a statute. It allows the prosecutor to identify the perpetrators as Indians or non-Indians, at his will, and prosecute under the easier statute.

An Indian can not always remove his name from the tribal membership rolls--to emancipate himself from a tribe. United States v. Ives, 504 F2d 935 (1974). He may still be regarded as an Indian because of his physical racial characteristics.

The argument raised by the Appellants as to the identification of the term, "Indian" is indicative of the different interpretations that have been precipitated by prosecutors in the past. These past results only reveal the present and future quagmires an Indian, under 18 U.S.C. 1153, must wade through.

This lack of identification of who is an Indian, leaves prohibitive discretion with the administrators of the laws in violation of due process as required under the Fifth Amendment. It renders 18 U.S.C. 1153 unconstitutionally vague.

The problem can be envisioned in yet another example. If a white or other non-Indian were to be adopted by an Indian tribe and be accepted by all outward appearances and authority as an Indian, but lack the requisite percentage of blood, how would a prosecutor treat him? The prosecution would be at liberty to accept or reject any tribal enrollment by classifying it as non-determinative, and proceed with the prosecution under the more facilitating jurisdiction. The result is as one commentator expressed it: "Reminiscent of the kind of discrimination that occurred prior to Erie v. Tompkins, 304 U.S. 64 (1938), where non-residents were allowed to take advantage of the federal common law and residents were compelled to rely on the law of the state." See, "Indictment Under the 'Major Crimes Act' - An Exercise in Unfairness and Unconstitutionality", 10 Ariz. L. Rev. 691, (1968).

It was in Niemotko v. Maryland, 340 U.S. 268, 285 (1951) that this Court said:

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance

an action appears not arbitrary does not save the validity of the authority under which the action was taken."

Even though it seems clear that Mr. Antelope, if it were ever determined by a jury that he did cause the death of Mrs. Johnson, was on notice that such action was prohibited by law and that perhaps no arbitrary action was taken in this case at the bar: "The Court can upset the conviction . . . by allowing defendant to invoke hypothetical unconstitutionalities not actualized in his case . . . ." See, "The Void-For-Vagueness Doctrine in the Supreme Court", University of Pa. L. Rev. 190:67 105 (1960).

The unconstitutional vagueness must not be allowed to stand for future Indians in not so clear a situation.

The vagueness of the definition of the term, "Indian" in 18 U.S.C. 1153 fits both categories used by this Court in the past to cause it to be rendered unconstitutional: (1) It does not give sufficient notice to citizens of the United States, and (2) It allows overbroad administrative discretion. It is impossible to always be certain who will be classified as an Indian and who will not, therefore, 18 U.S.C. 1153 must be found unconstitutional and it must be sent back to the Congress for remedy since it is not within the power and authority of this Court to rewrite the statute in a manner which would

remove these detailed infirmities.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals be affirmed.

ALLEN V. BOWLES,
Counsel for Respondent.

July 1976.

CERTIFICATE OF SERVICE

All parties required to be served have been served by depositing three (3) printed copies of Brief for Gabriel Francis Antelope, et al. in the United States post office with air mail postage prepaid, addressed to Mr. Robert M. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, on the 29 day of July, 1976.

Allen V. Bowles

Allen V. Bowles,
Counsel for Respondent.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-661

UNITED STATES OF AMERICA,
Petitioner,

v.

GABRIEL FRANCIS ANTELOPE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS WILLIAM ANDREW DAVISON AND LEONARD FRANCIS DAVISON

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QUESTIONS PRESENTED

1. Whether, in legislating with regard to criminal offenses committed within Indian Country, Congress has violated Indians' constitutional rights to equal protection by legislating laws which subject them to harsher criminal standards based solely on their racial classification when no compelling governmental interest exists.

2. Whether, 18 U.S.C. 1153 is so vague on its face and in its application that it lacks constitutional certainty as to whom the statute will bring under its provisions for criminal jurisdiction.

3. Whether, if the first question is answered in the affirmative, the Court should invalidate those portions of 18 U.S.C. 1152 and 1153 which define and punish offenses committed in Indian Country more harshly than the laws of the State in which the offenses are committed thereby adopting 18 U.S.C. 7 and 13 for substantive definitions of crimes committed within Indian Country.

STATEMENT OF THE CASE

Petitioner's Brief sets forth the facts pertinent to the case now before the Court. (Pet. Brief 5-8). At page 6 of Petitioners' Brief it is concluded that the evidence was sufficient to submit to the jury a charge of premeditated murder. The testimony from the only eye witness, Norbert Seyler, raises questions as to causation. (See A. 6-9). Seyler's testimony points to the conclusion that the deceased was dead before William Davison made physical contact with the deceased. Seyler's testimony did not conclude that Leonard Davison's conduct resulted in the deceased's death. (See A. 6-9). Thus, Respondents, Leonard Davison and William Davison, submit that without the Felony Murder Provision contained within the applicable Federal Statutes (18 U.S.C. 1153 and 1111) the Government would not have been able to sustain the charges contained within Count III of the indictment, murder. (A. 4-5).

The question as to causation was raised on appeal as to Respondent William Davison. The Court of Appeals concluded that since the constitutional issue was dispositive of the case there was no need to consider the causation issue. (Pet. App. 15a). Should this Court reverse the Court of Appeals' decision, the causation issue would then become viable as to Respondent William Davison.

In all other respects, Respondents Leonard Davison and William Davison have no disagreement with Petitioners' Statement. (Pet. Brief 5-8).

SUMMARY OF ARGUMENT

I.

Respondents, Leonard Davison and William Davison, were discriminated against by reason of their Indian race when charged with first degree murder in Count III of the indictment pursuant to 18 U.S.C. §1153 and §1111. Under those federal statutory provisions the Government's burden of proof was lessened by the felony murder provision contained within 18 U.S.C. §1111. If the Respondents had been non-Indian under the jurisdiction provisions contained within 18 U.S.C. §1152 and §1153 they would have been subject to Idaho jurisdiction and the Idaho homicide statute, I.C.A. §18-4003, which does not contain the felony murder doctrine. Due to Respondents' race the Government was not required to prove the mens rea element of premeditation and deliberation which made the prosecution of Respondents less burdensome than it would otherwise have been had they been non-Indian.

A. Crimes committed within Indian Country are subject to three possible forums; federal, state, and tribal, depending upon the nature of the offense, the race of the victim and the race of the defendant.

Crimes committed within Indian Country which are contained within the Major Crimes Act, 18 U.S.C. §1153, are divided into four possible jurisdictional categories depending upon the race of the victim and the race of the defendant. A defendant charged with violation of one of the crimes enumerated in the Major Crimes Act will be faced with either state court or federal court jurisdiction. The two jurisdictions oftentimes define the same criminal offense in a different manner. This often results, as it did here, in a defendant, due to his race, being compelled to defend himself against a harsher standard.

When a defendant is charged with committing a crime within Indian Country which is not contained within the Major Crimes Act, 18 U.S.C. §1153, the forum having jurisdiction will be either federal court, state court, or tribal court, depending upon the race of the defendant and the race of the victim. Here again, disparities exist between the standards which the defendant must defend himself. The disparities in the standards are based solely upon racial classifications.

This situation becomes further perplexed by virtue of 18 U.S.C. §1162, commonly known as Public Law 280. Six states are affected by Public Law 280. In those states all crimes committed within the enumerated Indian reservations are subject to state court jurisdiction entirely without regard to the race of the defendant or the race of the victim. The enactment of 18 U.S.C. §1162 indicates Congressional recognition that the Federal Government's trust responsibility towards

Indians is not necessarily furthered by requiring absolute federal court jurisdiction when criminal offenses are committed within Indian Country where an Indian is involved as either a perpetrator or a victim.

The statutory framework pertaining to crimes committed within Indian country creates prejudicial disparities based solely upon racial classifications which are contrary to the due process and equal protection provisions of the Constitution.

B. The term, Indian, contained within 18 U.S.C. §1153 is a racial classification. Only people who have the requisite percentage of Indian blood come within the purview of the criminal jurisdiction of the Federal Government under 18 U.S.C. §1153. The recent case of *Morton v. Mancari*, 417 U.S. 535, allowed the Bureau of Indian Affairs' employment preference of Indian applicants over non-Indian applicants for the reason that the Federal Government had a political-social relationship with the Indians which justified such a preference. The holding of the *Mancari Case* is limited to that proposition only and does not countenance the discrimination which exists here.

C. The racial classifications of 18 U.S.C. §1152 and §1153 result in invidious discrimination without furthering a compelling governmental interest. The plenary power of Congress over Indians and the Government's trust responsibility for Indians do not furnish a compelling federal interest to justify this racial classification. In fact the racial classifications existing here have frustrated the Government's trust responsibility toward Indians by conferring a hardship based solely upon their race.

II.

The term Indian contained within 18 U.S.C. §1153 is unconstitutionally vague. This allows administrative discretion in determining who comes within the definition of the term "Indian" for purposes of selective prosecution. The term "Indian" is not defined within Chapter 53 of Title 18 of the United States Code. This failure has caused problems of certainty in determining which people fall within this classification for purposes of criminal jurisdiction. The vagueness created by the definition of the term "Indian" renders the statute unconstitutional.

III.

If the Court agrees with the Court of Appeals that unconstitutional results occur when provisions of 18 U.S.C. §1152 and §1153 treat Indian defendants harsher than similarly situated non-Indian defendants are treated the Court should consider a construction which will lead to constitutional results. 18 U.S.C. §1152 and §1153 can be construed together with 18 U.S.C. §7 and §13 to cover criminal offenses committed within Indian Country without creating racial disparity in the treatment of potential defendants.

This result can be achieved by invalidating those portions of 18 U.S.C. §1152 and §1153 which define and punish offenses committed within Indian Country more harshly than the laws of the state in which the offenses are committed and thereby allow the Assimilated Crimes Act, 18 U.S.C. §7 and §13, to control the substantive definition of crimes.

Should the Court elect to construe the statutes to allow for this result Congress would still maintain the right to legislate for criminal offenses committed within Indian Country. Such a result would not violate the trust responsibility that the Federal Government has toward Indians; in fact, it would further that responsibility by remedying the discriminatory results which have occurred here.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I.

RESPONDENTS WERE DENIED EQUAL PROTECTION OF THE LAWS.

Respondents were discriminated against by reason of their Indian race in that the Government's burden of proof under 18 U.S.C. §1153 and §1111 were lessened by the Felony Murder Provisions contained therein. Given the Federal Statutory Provisions of 18 U.S.C. 1152 and 1153 if the Respondents had been non-Indian they would have been subject only to Idaho jurisdiction. The Homicide Statute in the State of Idaho, I.C.A. §18-4003, does not contain the Felony-Murder Doctrine, thus, due to Respondents' race, the Government was not required to prove the mens rea element of premeditation and deliberation which made prosecution of Respondents less burdensome than had Respondents been non-Indian subject only to Idaho jurisdiction.

A. The Existing Allocation Of Federal And State Jurisdiction Over Offenses Committed Within Indian Country Is Constitutionally Invalid.

Crimes committed within Indian Country are subject to three possible forums; Federal, State, and Tribal, depending upon the nature of the offense, the race of the victim and the race of the defendant.

Crimes defined under 18 U.S.C. 1153, the Major Crimes Act, are subject to either Federal Court of State Court, depending upon the race of the defendant and the race of the victim. These crimes fit into four categories for jurisdictional purposes. The crime of murder is one of the thirteen major crimes enumerated in 18 U.S.C. 1153. The four possible jurisdictional categories for the offense of murder committed within Indian Country are as follows:

(1) The crime of killing an Indian by an Indian is governed by the Major Crimes Act, 18 U.S.C. §1153. Murder under that section is defined in 18 U.S.C. §1111, which includes the felony murder definition.

(2) The crime of killing of an Indian by a non-Indian is governed by the Federal Enclave Law, 18 U.S.C. §1152, which also refers to §1111 for the definition of murder.

(3) The crime of killing a non-Indian by an Indian is controlled by §1153, as defined in §1111. This is the situation in the case before the court.

(4) The killing of a non-Indian by a non-Indian in Indian country is a matter for prosecution by the state in which the offense occurred. *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1881); *United States v. Cleveland*, 503 F.2d 1067 (CA 9 1974). The definition of murder in such a case is

determined by reference to the situs state's law. In the State of Idaho, the homicide statute does not contain the felony murder definition. (I.C.A. §18-4003).

Crimes committed within "Indian Country" not contained within the Major Crimes Act (18 U.S.C. 1153) are subject to three possible forums depending upon the race of the defendant and the race of the victim. The four possible jurisdictional categories follow:

(1) Crimes involving Indian victims and Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to the Tribal Court. 18 U.S.C. 1152; *Acuina v. United States* 404 F.2d 140 (1968).

(2) Crimes involving Indian victims and non-Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to Federal jurisdiction by virtue of the Assimilated Crimes Act (18 U.S.C. 7 and 13[1]; 18 U.S.C. 1152).

(3) Crimes involving non-Indian victims and Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to Federal Jurisdiction. (18 U.S.C. 1152; 18 U.S.C. 13; *United States v. Burland* 441 F.2d 1199).

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[1] 18 U.S.C. §§7 and 13 provide:

§7. SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES DEFINED

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within

(continued)

(4) Crimes involving non-Indian victims and non-Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to State court jurisdiction. (18 U.S.C. 1152; *New York ex rel.*

(footnote continued from preceding page)
the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.
(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

§13. LAWS OF STATES ADOPTED FOR AREAS WITHIN FEDERAL JURISDICTION

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Ray v. Martin 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. (14 Otto) 621; *United States v. Cleveland* 503 F.2d 1067 (CA9 1974); *State v. Jones* 546 P.2d 235 (1976 Nevada).

In addition to the jurisdictional categories listed above there are six states which have total jurisdiction over all crimes committed within their state including the Indian Territory within their borders are defined within 18 U.S.C. 1162, commonly known as P.L. 280[2]. This jurisdiction is invoked without regard to the nature of the offense, the race of the victim or the race of the defendant. In these states, the provisions of 18 U.S.C. 1152 and 1153 do not apply.

[2] 18 U.S.C. §1162 provides:

1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY.–(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

STATE OR TERRITORY OF	INDIAN COUNTRY AFFECTED
Alaska	All Indian country within the Territory (State)
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation

(continued)

The question presented is whether Congress has violated Respondents' constitutional rights to equal protection by legislating laws which frequently subject Indians to harsher criminal standards based solely upon their racial classification when no compelling Governmental interest exists.

Petitioner argues that the division of responsibility for crimes committed within Indian Country is validly divided between the Federal and State jurisdictions. Petitioner argues that where Indians are involved the federal trust responsibility justifies federal jurisdiction. Where non-Indians are involved it is argued that no federal interest or trust is involved and the matter then becomes solely of state concern. (Pet. Brief 24-25).

Petitioners' argument fails when one considers 18 U.S.C. 1162, commonly known as P.L. 280. If in fact Congress has a federal trust responsibility to Indians which justifies differences in state and federal jurisdiction depending upon whether an Indian is involved

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(footnote continued from preceding page)

Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shal (sic) not be applicable within the areas of Indian country listed in subsection (a) of this section.

either as a victim or perpetrator it was not recognized by Congress in legislating 18 U.S.C. 1162.

As previously stated, 18 U.S.C. 1162 confers absolute jurisdiction to six states for all offenses committed within the respective state's enumerated Indian reservations without regard to whether an Indian is a perpetrator or victim. Defendants in other states accused of committing crimes on Indian reservations are subject to the statutory scrutiny previously set forth which depends upon the nature of the offense, the race of the victim and the race of the defendant. This statutory framework creates prejudicial disparities based upon racial classification contrary to the due process and equal protection provisions of the constitution.

The petitioner's federal guardianship interest argument summarized at pages 24 and 25 of Petitioner's Brief fails in view of 18 U.S.C. 1162.

Indians accused of crimes within Indian reservations located within the six states enumerated in 18 U.S.C. 1162 are subject to state law definitions while Indians living on reservations in other states are subject to the federal law definitions when accused of crimes enumerated in 18 U.S.C. 1153. Even here, some crimes contained within 18 U.S.C. 1153 are relegated to the states' substantive definition.

B. Federal Legislation Concerning Crimes Committed "Within Indian Country" Is Based Upon An Impermissible Racial Classification.

The essential question presented by this case is whether criminal jurisdiction over Indians is acquired through a statute based on racial classification. The statute rendering jurisdiction over Indians in criminal

matters uses racial language on its face. "*Any Indian* who commits against the person or property of another *Indian* . . ." (18 U.S.C. 1153) (Emphasis supplied.)

Although the statute does define the other requirement for criminal jurisdiction, i.e. Indian Country, (18 U.S.C. 1151) it does not define the term, Indian. The earliest definition of that term by this Court was in *United States v. Rogers*, 45 U.S. 567 (1846). There the defendant, a white man lived on the Cherokee reservation for nearly ten years, married an Indian, became adopted by the tribe under proper authority and exercised all rights and privileges of a Cherokee Indian. The Court refused to define him as an Indian for purposes of criminal jurisdiction.

> ". . . we think it very clear, that *a white man* who at a mature age is *adopted in an Indian tribe does not thereby become an Indian*. . . . He may by such adoption become entitled to certain privileges in the tribe. . . . Yet *he is not an Indian;* and the exception is confined to those who by the usages and customs of the Indians are regarded as *belonging to their race*. It does not speak of members of a tribe; but of the race generally,—of the family of Indians. . . * * * Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, ... He *was still a white man, of the white race*. . . ." *United States v. Rogers, supra,* at 572-573. (Emphasis added.)

In a later case this Court refused to allow a Black to be adopted into an Indian tribe for criminal jurisdiction purposes.

> "Although the prisoner, Alberty, was not a native Indian, but a negro born in slavery, *it was not disputed that he became a citizen of the Cherokee nation*. . . * * * While this article of the treaty gave him the rights of a native Cherokee, *it did not . . . make him an Indian,* within the meaning of Rev. St. Section 2146. . . ." *Alberty v. United States,* 162 U.S. 499, 500, 501 (1896). (Emphasis supplied.)

In still a later case, this Court was faced with how to determine which persons would fall into the guardianship category for protection. It continued the racial definition for the term, Indian. "Congress has recognized that un-enrolled Creeks of the *half-blood or more are tribal Indians* subject to federal control." *Board of Commissioners v. Seber,* 318 U.S. 705, 718 (1942). (Emphasis supplied.)

The Association on American Indian Affairs' book, *Federal Indian Law,* (1966) at 8, which is a manual used by the Interior Department and its office for Indian Affairs has insisted on the requisite of Indian blood.

> "Within the meaning of those various statutes which though applicable to Indians do not define them, the courts, in defining the status of Indians of mixed Indian and other blood, have largely followed the test laid down in *United States v. Rogers,* to the effect that *an individual to be considered an Indian must* not only *have some degree of Indian blood* but must in addition be recognized as an Indian." (Emphasis supplied.)

In *State v. Atteberry,* 110 Ariz. 354, 519 P.2d 53, 54 (1974) to determine whether the defendant came within the purview of 18 U.S.C. 1153 as an Indian, the Arizona Supreme Court held:

> ". . . the test of Indian status has depended on two things (a) a substantial percentage of Indian blood, and (b) recognition as an Indian."

In *United States v. Ives,*[3] 504 F.2d 935 (1974) the defendant was convicted of murdering a non-Indian on an Indian reservation thereby coming under 18 U.S.C. 1153. He was identified as an Indian, even though he had voluntarily and on his own initiative tried to have his name removed from the tribal rolls a considerable time before the commission of the homicide. The court held nevertheless, that: "...enrollment or lack of enrollment is not determinative of Ives' status as an Indian." *United States v. Ives, supra,* at 953.

In *In Re Carmen's Petition,* 165 F. Supp. 942 (1958) aff'd per curiam sub nom; *Dickson v. Carmen,* 270 F.2d 809 (1959) cert. denied, the defendant had been convicted for the murder of an Indian within Indian Country, bringing into play 18 U.S.C. 1153 and 18 U.S.C. 1111. The court refused to accept the negation of tribal relations as bearing on the status of the defendant being an Indian.

> "Respondent also questions the applicability of the Major Crimes Act on the grounds that petitioner although an Indian by blood, is emancipated to such extent that he is not an Indian within the meaning of the Act. None of the decisions relied upon by respondent support this contention." *In Re Carmen's Petition, supra,* at 946.

The court did not consider whether an Indian can be emancipated so as to escape the Act. Instead, it cited *Davis v. United States,* 32 F.2d 860 (1929) as standing: "For the proposition that tribal relations have no bearing on an Indian's status as an Indian within the

[3] *United States v. Ives* was granted certiorari (421 U.S. 944), the judgment was vacated and remanded for consideration of the phychiatric examination issue of defendant's competency to stand trial as explained by the court in *Drope v. Missouri,* 95 S. Ct. 896.

meaning of the Ten Major Crimes Act." *In Re Carmen's Petition, supra,* 947.

There can be little question that 18 U.S.C. 1153 is a racial classification in using the term, "Indian." Tribal enrollment is not used by all courts to determine if the accused is either in or out of the so-called "social-political group" and tribal enrollment is most certainly not determinative of his racial status as an Indian. It should be pointed out that determination of who is enrolled on the tribal rolls is within the discretion of the Department of the Interior and its offices. The guidelines for such enrollment by those officers are also on a quantum of blood analysis.

> "The Indian tribes have orginal power to determine their own membership. Congress has the power, however, to supersede that determination... * * * Congress may authorize an administrative body to make a roll descriptive of the persons thereon so that they might be identified... * * * Congress may disregard the existing membership rolls of a tribe and direct that the per capita distribution be made upon the basis of a new roll, even though such act may be inconsistent with prior legislation, treaties, or agreements with the tribe. (See also 25 U.S.C. 163) Cohen's *Handbook on Federal Indian Law, supra,* at 98-99.

At pages 33-36 of Petitioner's Brief it is argued that the statutes in question do not rest upon impermissible racial classification but are based upon a political-social relationship which the Federal Government has assumed.

In support of this contention Petitioner relies upon the recent case of *Morton v. Mancari,* 417 U.S. 535. *Mancari,* supra, is distinguishable in that the matter before the Court was civil in nature and further worked to the benefit of the Indians. Here, the proceedings are

criminal in nature and impose a detriment upon the Respondents.

The Court in *Mancari*, supra, at page 554, limited its holding to preferring Indians in Bureau of Indian Affairs' employment only:

> "... Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Governmental agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. ..."

It is for the above described reasons that the court of appeals in the case at the bar stated: "We here emphasize that the *sole* basis for the disparate treatment of appellants and non-Indians is that of race." (Pet. App. 6a) It is because of this racial classification that criminal jurisdiction exists (18 U.S.C. 1153).

C. The Racial Classifications Contained Within 18 U.S.C. §§1152 And 1153 Result In Invidious Discrimination Without Furthering A Compelling Governmental Interest.

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is violative of due process. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Johnson v. Robison*, 415 U.S. 361 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The Court in *Bolling v. Sharpe*, *supra*, held that the Fifth Amendment applies to the **federal** government much like the Fourteenth Amendment does to the states.

> "Classification based solely upon race must be scrutinized with particular care, since they are contrary to our traditions, and hence constitutionally suspect. As long ago as 1896, this Court declared the principal, 'that the Constitution of the United States, in its present form, forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling v. Sharpe*, *supra*, at page 499.

When a racial classification is seen as being unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it will also be seen as unconstitutional under the due process requirement of the Fifth Amendment. To allow a racial classification statute to stand, the government must show some *compelling interest* in the classification.

This Court in *Hunter v. Erickson*, 393 U.S. 385, 392 (1969), explained that:

> "... racial classifications are constitutionally suspect and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications."

This Court has noted that the "traditional indicia of suspectness" are: (1) a class determined by characteristics which are solely an accident of birth; or (2) a class subjected to such a history of purposefully unequal treatment of relegated to a position of such political powerlessness, as to command extraordinary protection from the majority. *Johnson v. Robison*, 415 U.S. 361 (1973). The present classification fits both categories: the class is determined by accident of birth, and the class has been subjected to a history of unequal treatment resulting in political powerlessness.

Justice Harlan in *Hunter v. Erickson*, *supra*, at 393, described what might be necessary to sustain the

required heavy burden of justification. "Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind."

Justice Steward in *McLaughlin v. Florida*, 379, U.S. 184, 198 (1964), explained:

> "It is simply not possible for a state law [or in this case a federal law] to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."

Although the criminality of the act per se is not based on race; i.e., 18 U.S.C. 1111 is not racial in classification. The jurisdictional power which brings the defendant under 18 U.S.C. 1111 is based on race, thereby creating an identical result as in *McLaughlin, supra.*

Appellants argue that the compelling federal interest for this racial classification is two-fold: (1) the plenary power of Congress over Indians, and (2) the government's trust responsibility for Indians.

Congress has plenary power over Indians and a wide-scope of authority over their affairs. However, Congress in exercising power over Indian affairs is subject to the limitations contained in the Bill of Rights. In 1938 this Court, after noting the plenary power of Congress in this area added:

> "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to Constitutional limitations. . . ." *United States v. Klamath & Moada Tribes of Indians*, 304 U.S. 119, 123 (1938).

The trust responsibility must remain subject to constitutional limitations in recognition of Indians' inherent rights as citizens of the United States. This Court confirmed that position in *Keeble v. United States*, 412 U.S. 205, 211, 212 (1973).

> "In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others.' 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). *This is emphatically not to say*, however, *that Congress intended* to deprive Indian defendants of procedural rights guaranteed to other defendants, or *to make it easier to convict an Indian than any other defendant.*" (Emphasis supplied.)

It was this same reasoning that the Federal District Court of New Mexico in *United States v. Boone*, 347 F. Supp. 1031 (1972), applied in holding 18 U.S.C. 1152 to be a denial of equal protection: ". . . the defendant is subject to conviction upon a lesser burden of proof. . . ."

The Court went on to find:

> "In the case at bar, the racial differentiation in section 1153 results in disadvantages to the defendant and it is difficult to see any benefit to Indians generally. The racial classification is not reasonably related to any proper governmental objectives and is therefore arbitrary and invidious in violation of the due process clause of the Fifth Amendment." *United States v. Boone, supra*, at 1035.

The Eighth Circuit in *United States v. Big Crow*, 523 F.2d 955, 959 (1975) cert. denied, explained the wardship doctrine in this manner:

"While the Supreme Court has approved legislation singling out Indians for special treatment, such special treatment must at least be 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . .' It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection. We further question whether the rational basis test is the appropriate standard where racial classifications are used to impose burdens on a minority group rather than, as in *Morton v. Marcari*, 417 U.S. 535 (1974), to help the group overcome traditional legal and economic obstacles. It is the generally settled rule that the government bears the burden of showing a compelling interest necessitating racially discriminatory treatment. * * * Under the circumstances, we are constrained to hold that 18 U.S.C. 1153 can not constitutionally be applied so as to subject an Indian to a greater sentence than a non-Indian could receive for the same offense."

In *United States v. Cleveland*, 503 F.2d 1067, 1071 (1974), the Ninth Circuit in an 18 U.S.C. 1153 case held that:

"The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none."

There has been no disagreement among the various appellate federal decisions as to the issue of racial classification in 18 U.S.C. 1153, *United States v. Cleveland, supra; United States v. Analla*, 490 F.2d 1204 (1974); *United States v. Boone, supra; Henry v. United States*, 432 F. Supp. 1031; *Gray v. United States*, 394 F.2d 96 (1967); *Kills Crow v. United States, supra; United States v. Maestas*, 523 F.2d 316

(1975); *United States v. Big Crow*, 523 F.2d 955 (1975).

This Court in *McLaughlin v. Florida, supra*, at 192, held that where the statute uses racial classification it is suspect and must meet the compelling interest test, and, "Without such justification the racial classification . . . is reduced to an invidious discrimination."

Petitioners no where suggest that a compelling government interest exists for the racial classification which exists here.

Petitioners do argue at pages 33-36 of their Brief that the differences in jurisdiction furthered by the statutes in question are an important exercise of the federal trust responsibility for Indian tribes. Assuming this to be true, the racial discrimination which results does not foster a compelling governmental interest.

Further, it is certainly questionable whether Congress now recognizes a trust responsibility for Indians which can be furthered only by conferring jurisdiction to federal courts where Indians are involved as either perpetrators or victims when crimes are committed within Indian Reservations in view of 18 U.S.C. 1162.

Here, the situation which arose worked a detriment to the Respondents solely due to their race, contrary to the Federal Government's wardship and trust responsibility which Petitioner argues.

There being no compelling governmental interest to justify the racial classification which exists here, 18 U.S.C. 1153 must be found invidiously discriminatory and therefore unconstitutional as a denial of Respondent's Equal Protection and Due Process guarantees.

II.

THE TERM "INDIAN" CONTAINED WITHIN 18 U.S.C. 1153 IS UNCONSTITUTIONALLY VAGUE THUS ALLOWING ADMINISTRATIVE DISCRETION IN DETERMINING WHO COMES WITHIN THAT DEFINITION FOR PURPOSES OF PROSECUTION.

The court of appeals disapproved of allowing the government to circumvent discriminatory laws by accomplishing through discriminatory jurisdiction what it could not do through discriminatory statutory coverage.

> "The government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage. . . . To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity, employing jurisdiction as an inviolate tool." (Pet. App. 12a).

There is nowhere within Chapter 53 of Title 18 of the United States Code a definition of the term, "Indian".

The failure by the Congress to define the term "Indian" causes constitutional problems of certainty.

Justice Douglas in *United States v. Cardiff,* 344 U.S. 174 (1952) explained the vice of vagueness as it related to the lack of identification of the person to whom a criminal statute, or in this case criminal jurisdiction, would apply:

> "The vice of *vagueness* in criminal statutes is the treachery they conceal either *in determining what persons are included* or what acts are prohibited.

> Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." (Emphasis added.)

Not only must criminal activity be defined with definiteness and certainty, but criminal jurisdiction must inevitably fit the same standard. The underlying principle is that people are entitled to be informed not only as to what the state or federal government forbids, but also as to whom the law applies.

18 U.S.C. 1153 allows the prosecutor to identify the perpetrators as Indians or non-Indians at his will and prosecute under the easier statute.

An Indian can not always remove his name from the tribal membership rolls to emancipate himself from a tribe. *United States v. Ives,* 504 F.2d 935 (1974). He may still be regarded as an Indian because of his physical racial characteristics.

This lack of identification of who is an Indian, leaves prohibitive discretion with the administrators of the laws in violation of due process as required under the Fifth Amendment. It renders 18 U.S.C. 1153 unconstitutionally vague.

In *Niemotko v. Maryland,* 340 U.S. 268, 285 (1951), this Court said:

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."

The vagueness of the definition of the term, "Indian" in 18 U.S.C. 1153 fits both categories used by this Court in the past to cause it to be rendered unconstitutional: (1) It does not give sufficient notice to citizens of the United States, and (2) It allows

overbroad administrative discretion. It is impossible to always be certain who will be classified as an Indian and who will not; therefore, 18 U.S.C. 1153 must be found unconstitutional.

III.

THE COURT SHOULD INVALIDATE THOSE PORTIONS OF 18 U.S.C. §1152 AND §1153 WHICH DEFINE AND PUNISH CRIMINAL OFFENSE COMMITTED WITHIN INDIAN COUNTRY MORE HARSHLY THAN THE LAWS OF THE STATES IN WHICH THE OFFENSES ARE COMMITTED AND THEREBY ADOPT THE ASSIMILATED CRIMES ACT, 18 U.S.C. §7 AND §13 FOR SUBSTANTIVE DEFINITION OF CRIMES.

For the reasons enumerated above 18U.S.C. §1152 and §1153 are unconstitutional as applied due to the detrimental discriminatory treatment resulting to Respondents. If the Court agrees with the court of appeals that unconstitutional results occur when provisions of 18 U.S.C. §1152 and §1153 treat Indian defendants harsher than State law would treat similarly situated defendants, the Court should consider a construction which would lead to constitutional results.

It is submitted by Respondents that 18 U.S.C. §1152 and §1153 can be construed together with 18 U.S.C. §7 and §13 to cover criminal offenses committed within Indian Country without creating racial disparity in the treatment of potential defendants.

This constitutional result can be reached by invalidating those portions of 18 U.S.C. §1152 and §1153

which define and punish offenses committed within Indian Country more harshly than the laws of the State in which the offenses are committed and thereby allow the Assimilated Crimes Act, 18 U.S.C. §7 and §13, to control the substantive definition of the crimes. By so doing the Court would remove the racially discriminatory treatment which currently exists.

The last two paragraphs of 18 U.S.C. §1153 provide for the relegation of the substantive definition of some of the Major Crime Act offenses to State law. Thus, in these situations there is no disparity in treatment as to potential defendants. It is where the substantive definition of crimes contained within the Federal Code; i.e., 18 U.S.C. §1111, conflicts with State definitions; i.e., I.C.A. §18-4003, that discriminatory results occur. When these situations arise the federal definition should be invalidated and the State definition containing the more lenient standard should be adopted through the use of the Assimilated Crimes Act, 18 U.S.C. §7 and §13.

The first paragraph of 18 U.S.C. §1152 extends the general laws of the United States to Indian Country.

The second paragraph of 18 U.S.C. §1152 excludes the situation where an Indian is a defendant. By invalidating the second paragraph of 18 U.S.C. §1152 the provisions of the Assimilated Crimes Act, 18 U.S.C. §7 and §13, would become available for substantive definitions of criminal offenses committed within Indian Country as to all defendants regardless of race.

Congress would not be deprived of the right to legislate when the state definitions for offenses committed within Indian Country were applied if the definitions of Federal criminal offenses did not racially discriminate. Further, Congress would be able to

legislate criminal offenses committed within Indian Country where a state law definition did not exist.

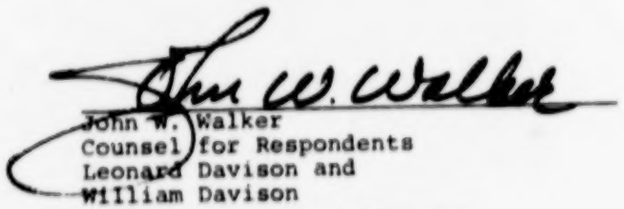
Such a result would not violate the trust responsibility that the Federal Government has toward Indians. Congress, by enacting Public Law 280, gave absolute jurisdiction over criminal offenses committed within Indian Country to six states regardless of whether an Indian was involved as a perpetrator or victim. Thus by enacting P.L. 280 it was recognized that by submitting criminal jurisdiction to states for offenses committed within Indian Country and allowing the states to define the substantive crimes, Congress was not ignoring its trust responsibilities. That is, the Federal Government's wardship or trust responsibility toward Indians is not necessarily furthered by requiring that criminal offenses committed within Indian reservations in which Indians are involved as either perpetrators or victims be necessarily a matter for Federal court jurisdiction.

Were the Court to adopt Respondents' suggested construction, crimes committed on Indian reservations would not go unpunished. All people regardless of race would be judged on the same standard as the constitution requires.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals be affirmed. If the Court reverses the court of appeals it is requested that as to respondent William Davison this case be remanded for determination of two unrelated pending issues now before the court of appeals.

Respectfully submitted,



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FOR ARGUMENT

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No. 75-661

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
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Respondents contend that the statutory scheme embraced by 18 U.S.C. 1152 and 1153 rests upon a racial classification, that accordingly it must be subjected to the closest possible scrutiny under equal protection standards, and that under such scrutiny no compelling governmental interest exists to justify the assertion of federal jurisdiction over crimes involving Indians but not those purely between non-Indians. They also contend that the term "Indian" contained in 18 U.S.C. 1153 is unconstitutionally vague. These claims do not withstand analysis.

1. Undeniably, 18 U.S.C. 1153 rests to some extent upon a racial classification: whether a person is racially an Indian is an important factor in determining whether he is an Indian within the meaning of the Major Crimes Act and for other aspects of federal trust responsibility. But as we have shown (Br. 33-36), it is only one factor. Equally important is whether a person is a member of a governmental body, a

federally recognized Indian tribe, towards which the government exercises a trust responsibility.[1] In any event, the category of Indian, for federal jurisdictional purposes, is

[1]In arguing that 18 U.S.C. 1152 and 1153 classify Indians "by quantum of blood and race, thereby creating a suspect classification" (Antelope Br. 4), respondents rely in particular upon the early case of *United States* v. *Rogers*, 4 How. 567, in which this Court held that a murder committed by one white man against another in the United States territory allotted to the Cherokee Indians was triable in federal court under an early version of 18 U.S.C. 1152, despite claims that the accused and the victim "at mature age" (*id.* at 572) had been "adopted" into the tribe. See also *Alberty* v. *United States*, 162 U.S. 499. But neither *Rogers* nor *Alberty* stands for the proposition that "blood and race" are determinative of the question whether a person is an Indian or not. *Rogers* itself, as the Indian authority Felix Cohen has noted, established a "test * * * to the effect that an individual to be considered an Indian must not only have some degree of Indian blood *but must in addition be recognized* as an Indian. In determining such recognition the courts have heeded both recognition by the tribe or society of Indians and recognition by the Federal Government as expressed in treaty or statute." *Handbook of Federal Indian Law* 3 (1942 ed.; emphasis added). This point is illustrated by the fact, as noted in our opening brief (pp. 35-36), that federal Indian jurisdiction does not extend to racial Indians who have severed their ties to the tribe or to tribes that have been "emancipated from federal guardianship and control." *United States* v. *Mazurie*, 419 U.S. 544, 554 n. 11.

Moreover, even assuming that the Court in *Rogers* regarded "Indian" as a term descriptive primarily of race, the historical reasons for that emphasis (for example, the problem of outlaws escaping federal jurisdiction by the expediency of obtaining adoption into an Indian tribe, see 4 How. at 573) are not present with equal force today, and there is ample support in the Court's subsequent decisions for Professor Cohen's view "that in dealing with Indians the Federal Government is dealing primarily not with a particular race as such but with members of certain social-political groups toward which the Federal Government has assumed special responsibilities." Cohen, *supra*, at 5. Certainly the Court need not today adopt or adhere to a "racial" definition of the term "Indian" in federal criminal jurisdictional statutes if the consequence of such a construction is to render the statutes unconstitutional in operation and seriously to impede law enforcement in Indian country.

not a suspect category. As this Court held in *Morton* v. *Mancari*, 417 U.S. 535, 551-553:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, §8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, §2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. ***
>
> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n. 13 (ED Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

Moreover, a claim of denial of equal protection requires a showing not merely that there has been a disparity of treatment but that the disparate treatment is invidious, and this Court has recently affirmed "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis*, 426 U.S. 229, 240. See *Village of*

Arlington Heights v. *Metropolitan Housing Development Corp.*, No. 75-616, decided January 11, 1977, slip op. 11-15. The Court has also recently emphasized, in dealing with legislation affecting aliens, that the fact that Congress has treated members of a group over which it has plenary power differently from other persons "does not in itself imply that such disparate treatment is 'invidious.'" *Mathews* v. *Diaz*, 426 U.S. 67, 80.

The disparity of treatment of which respondents complain is not invidious. As we pointed out in our opening brief (pp. 13-15), federal law treats equally anyone committing murder, regardless of race (or status as an Indian), within federal jurisdiction. The disparate treatment complained of by respondents arises only through a comparison with law from another jurisdiction, and then only by reference to the single class of cases in which both the perpetrator and victim of a crime in Indian country are non-Indian. The resulting differences in treatment do not stem from a purpose to discriminate against (or, for that matter, in favor of) Indian defendants, but from a recognition by the Congress and this Court that when neither the perpetrator nor the victim of a crime in Indian country is Indian, the federal trust responsibility over the Indian tribes is not implicated and federal jurisdiction may properly yield to the State's basic interest in the uniform application of its laws to its citizens. *United States* v. *McBratney*, 104 U.S. 621, and cases cited at p. 17 of our opening brief. Furthermore, in such a case no affirmative "treatment" of Indians by Congress comes into play, but merely a decision to leave prosecution of the non-Indian to state authorities under state procedural and substantive rules that inevitably will differ in some respects from federal law. Even if this statutory scheme rests ultimately upon a racial classification, therefore, its effect or purpose cannot be characterized as invidious.[2] Indeed, as we discussed at length in our opening brief, this Court has repeatedly endorsed the jurisdictional limitation on the scope of 18 U.S.C. 1152 without so much as suggesting that it might operate to deny an individual Indian defendant the equal protection of the law.

In challenging the jurisdictional allocation contained in 18 U.S.C. 1152 and 1153, as interpreted by this Court, respondents mount a broad attack on the continuing validity of the federal wardship doctrine, asserting that it may be sufficient as a basis for "benign" legislation intended to help Indians but that it provides no rationale for permitting Indian criminal defendants to be tried at a procedural or substantive disadvantage compared to their non-Indian counterparts in state court (Antelope Br. 23-27; Davison Br. 12-13, 17-18). The Davison respondents argue, indeed, that Congress has recognized the obsolescence of the wardship concept by its decision in 1953 giving five States complete criminal and civil jurisdiction over most reservations within their boundaries, and consenting to the

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[2]This case does not require the Court to grapple with the considerably more difficult question presented by cases such as *United States* v. *Cleveland*, 503 F. 2d 1067 (C.A. 9), which was invoked by the court of appeals to support its decision in the instant case, and upon which respondents rely (Antelope Br. 26-29; Davison Br. 21-23). There is, as we pointed out in our opening brief (pp. 31-33), a critical distinction between the instant case and the *Cleveland* line of cases—in the latter, the courts were confronted with federal legislation affirmatively providing for different substantive standards and punishment provisions, depending upon the status of the defendant as Indian or non-Indian, although both classes of defendants would be tried in federal court. The cases thus involved an affirmative legislative discrimination based solely upon the status of the defendant. This discrimination was a product of legislative oversight and served no discernible purpose (it has now been rectified by amendment of Section 1153 (Indian Crimes Act of May 29, 1976, Pub. L. 92-297, 90 Stat. 585). Respondents' arguments entirely overlook these critical distinctions.

assumption of such jurisdiction by any other State. Pub. L. 280, Act of August 15, 1953, ch. 505, Sections 2, 7, 67 Stat. 588, 590.

Respondents' deprecation of the wardship doctrine, however, is contradicted by an unbroken line of this Court's decisions reaffirming the responsibility of the federal government both to foster Indian self-government and at the same time to assume a limited role in the regulation of the conduct of individual Indians for the protection of the tribes and of society at large. That responsibility is not diminished by the fact that Congress has concluded that in certain geographical areas or with respect to a particular class of conduct (crimes entirely between non-Indians), the necessity for exercising its trust responsibility does not exist. Although the federal power over the Indian tribes is plenary, Congress may—as with its similar power over other matters—make reasonable judgments regarding the extent to which the power should be exercised in particular kinds of cases. Indeed, as this Court's decisions make clear, the decision how far to assert federal jurisdiction in Indian country is a particularly difficult one because it affects not only federal interests and the residual sovereignty of the tribes but important state interests as well.

Pub. L. 280, as amended, does not, as the Davison respondents argue, show the arbitrariness of the scheme of federal criminal jurisdiction in Indian country; instead, it illustrates Congress' concern to achieve a proper balance between the oft-divergent interests of the different sovereigns in this field. As originally enacted, the law conferred upon five States all civil and criminal jurisdiction in Indian country except as to certain tribes that had "a tribal law and order organization functioning in a reasonably satisfactory manner" and that had opposed the transfer of jurisdiction. H.R. Rep. No. 848, 83d Cong., 1st Sess. 6 (1953). Section 7 of the law also gave Congressional approval to similar as-

sumption of jurisdiction by any other State without requiring tribal consent, although Congress emphasized that "the attitude of * * * the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer * * * " (*ibid.*). In the ensuing years, tribes criticized this provision for transfer of jurisdiction without their consent "and regardless of their needs or special circumstances." S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967). In the Indian Civil Rights Act of 1968, 82 Stat. 77 *et seq.* (25 U.S.C. 1301 *et seq.*), therefore, Congress amended Section 7 of Pub. L. 280 to require tribal consent to such transfers in the future (25 U.S.C. 1321). The Act also authorized the federal government to accept retrocession by any State of all or partial criminal or civil jurisdiction previously acquired under Pub. L. 280 (25 U.S.C. 1323).

Thus Pub. L. 280, as amended, provides for the withdrawal (or resumption) of federal jurisdiction over crimes by or against Indians in a manner fully consistent with Congress' trust responsibility to the Indian tribes. Insofar as it permits complete state jurisdiction in Indian country with the consent of the tribes affected, it accords logically with Congress' long-standing decision (embodied in 18 U.S.C. 1152 and 1153) to exercise its authority over those crimes that affect "essential tribal relations" (*Williams* v. *Lee*, 358 U.S. 217, 219-220) but to leave to state prosecution crimes on the reservations that do not personally involve Indians.

18 U.S.C. 1152 and 1153, as interpreted by this Court (and as modified by Pub. L. 280), represent a reasonable and, on the whole, historically successful balance of the interests of the tribes and the federal and state sovereignties in Indian country. Respondents' equal protection argument, if accepted, would destroy this balance without any predictable benefit to the tribes or to their individual members. Presumably, as we explained in our brief (pp. 42-45), the disparate treatment of which respondents complain

could be eliminated by a construction of Section 1152 overriding the States' historic interests and divesting them of all criminal jurisdiction in Indian country (although the Davison respondents apparently still would argue that they were denied equal protection by comparison to a hypothetical Indian defendant tried under arguably more lenient circumstances in a State covered by Pub. L. 280). Absent such a construction, however, the "equality" of treatment that respondents demand can be accomplished only by the surrender of federal supremacy in the exercise of its trusteeship and the complicated comparison of federal and state law in search of leniency illustrated in our brief (pp. 36-42). We submit that an Indian defendant may properly be tried under federal law without resort to either of these extreme interpretations of the federal statutory scheme.

2. Respondents contend that Section 1153 is unconstitutionally vague because of the discretion it purportedly gives to prosecutors to decide who is an "Indian" for purposes of criminal prosecution. We do not believe that vagueness as to a jurisdictional consideration unrelated to the definition of the elements of an offense could ever present a constitutional problem—the matter would simply require clarifying judicial construction. In any event, respondents, all of whom are enrolled tribal Indians, do not deny that their conduct was clearly unlawful under both state and federal statutes (Antelope Br. 38).[4] And it is settled that "vagueness challenges to statutes which do not involve First Amendment freedoms"—as 18 U.S.C. 1153

[4]The Davison respondents contend only generically that Section 1153 "does not give sufficient notice to citizens of the United States"; they do not suggest that they are within the specific class of those who have emancipated themselves from tribal membership but "may still be regarded [by a prosecutor] as an Indian because of [their] physical racial characteristics" (Davison Br. 25).

assuredly does not—"must be examined in the light of the facts of the case at hand." *United States* v. *Powell*, 423 U.S. 87, 92, quoting *United States* v. *Mazurie*, 419 U.S. 544, 550; *Crowell* v. *Benson*, 285 U.S. 22, 62. Respondents thus cannot avoid the application of 18 U.S.C. 1153 to their conduct by the claim that it might be unconstitutionally vague as applied to others. See *Parker* v. *Levy*, 417 U.S. 733, 756.

For these reasons, in addition to the reasons set out in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.